Living Treaties: Lasting Agreements

Report of the Task Force To Review Comprehensive Claims Policy

December 1985

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Report of the Task Force
To Review Comprehensive Claims Policy

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The Honourable David Crombie
Minister of Indian Affairs
and Northern Development
Ottawa, Ontario
K1A 0H4

December 1985

Dear Mr Crombie:

As chairman of the Task Force to Review Comprehensive Claims Policy, I am pleased to submit our report to you. As its name implies, the task force was charged with conducting a review of the federal government's policy on comprehensive claims. Since July we have travelled across Canada to consult with aboriginal groups, governments, and other parties.

During our work we were reminded that the land claims process dates back to the seventeenth century, when representatives of the British Crown entered into treaties with North American Indians. The first land claims policy was the Royal Proclamation of 1763. After Confederation, the Government of Canada continued the process of treating with Indians to clear title to land in the western territories for settlement. In 1973, a new policy was announced to settle outstanding land claims. This policy was revised in 1981 and was published under the title In All Fairness.

Just as the willingness of the British Crown to treat with the Indians for their land was unique in its time, Canada's modern policy, based upon the principles of negotiation and consent, has broken new ground in our relationship with aboriginal peoples. Nevertheless, our history of treaty making and claims negotiations has been the cause of significant bitterness and frustration for aboriginal peoples. Canada often has failed to live up to both the spirit and the letter of the treaties. Since 1973, the federal government and aboriginal groups have spent more than $100 million on negotiations, yet have produced only three agreements, while twenty-one claims are under, or await, negotiation. The comprehensive claims policy and the process for negotiation are clearly in need of reform.

When you appointed this task force, following your discussions with aboriginal groups, the terms of reference required that we consult with all aboriginal groups that have submitted comprehensive claims to the federal government. Chief Gary Potts of the Teme—Augama Anishnabai told us that "this...marks the first time since 1763 that government has made an effort to hear from the First Nations of Canada in a Treaty making policy form[ul]ation." It may seem unusual for one of two negotiating parties to consult with the other in the search for a new policy to guide it during the negotiations; however, if a new policy is to succeed, it cannot conflict with the fundamental objectives of the aboriginal groups. Thus, we need to find common ground upon which to build agreements.

The task force has received briefs from fifty-two aboriginal groups and has met with fifty. The representatives of the aboriginal groups were both eloquent and persuasive in their presentations. We were impressed by their willingness to look beyond their own needs and to address the interests of all Canadians.

The task force also has received briefs and letters from twenty-one non-aboriginal organizations and individuals, and has met with representatives of territorial and provincial governments. Officials from your department and from other federal departments also made important contributions. We thank all who participated for their interest and co-operation.

I also should like to thank the members of the task force and our staff. In just over five months the task force has held ninety meetings, has considered seventy-three submissions, and has prepared this report, which would have been impossible without their dedication and diligence.

Neither budget nor schedule permitted the task force to undertake independent research. Thus, we have developed neither recommendations on the administrative details for conducting negotiations nor detailed projections of the cost of our recommendations. Some groups remarked that we had an enormous task to complete in such a short time and recommended that we delay our report. We were determined not to do so. Already, too much time and too many resources have been wasted because of the lack of urgency given to negotiations in the past. The task force did not want to become yet another cause for delay in reaching agreements.

Some who read this report may ask why aboriginal peoples should have rights to which other Canadians are not entitled. The answer lies in our history and in our Constitution. The Royal Proclamation of 1763 and the treaties signed by the British Crown and the Government of Canada recognized the aboriginal interest in the land and offered protection to Indian fishing and hunting rights. Our Constitution recognizes a number of communal rights, among which are aboriginal rights. These rights are in recognition of the original inhabitants of Canada and the distinctive place that they have within Confederation.

Aboriginal groups want comprehensive claims agreements to affirm their rights. Under earlier policies the federal government sought to clear title to the land, and insisted that aboriginal rights be extinguished. The conflict in the objectives of the two parties has impeded successful negotiations. A new policy should not require aboriginal peoples to surrender totally rights that our Constitution has so recently recognized and affirmed. We therefore recommend that blanket extinguishment of aboriginal rights no longer be a pre-condition for settlement.

Comprehensive claims agreements can be a first step in building a new relationship with aboriginal peoples. To survive, relationships must be flexible, to allow for growth and to meet the changing needs of aboriginal communities and Canadian societies. The policy also should be flexible enough to be responsive to dramatic differences from one region of Canada to another in aboriginal economies and lifestyles, in the economic potential of the land and its resources, and in the policies of provincial or territorial governments. If a major goal of agreements is the building of self-sufficient aboriginal communities, each agreement should vary according to the needs and potential within each region. A national formula for land quantum or a single settlement model that establishes binding precedents for future agreements should not be considered.

Agreements should also provide a framework in which to promote the certainty about aboriginal rights that will encourage economic development. The new policy should encourage aboriginal communities not only to become economically self-sufficient but also to establish political and social institutions that will allow them to become self-governing. The two must develop together because political power is meaningless without the backing of financial resources. Thus, land without the power to manage what happens on it, or the right to fish without a say in the management of fish stocks, will only perpetuate the dependency of aboriginal peoples. The new policy also should enable aboriginal groups to share in the financial rewards of development on their traditional territories. We recommend that the policy should permit the negotiation of an aboriginal share of resource revenues and the establishment of a capital fund to enable aboriginal investment in economic development.

The federal government should encourage the provincial and territorial governments to participate in negotiations. Recent history in British Columbia shows the importance of provincial participation if aboriginal claims are to be settled through negotiation rather than through litigation. Consultation with the provinces before a decision on a new policy will be an important step in seeking their co-operation. If federal leadership fails to encourage provincial participation, we recommend that the federal government negotiate vigorously matters that fall within federal jurisdiction.

The current comprehensive claims process is not open to all aboriginal groups. The claims policy limits access to aboriginal groups that have never signed a treaty with Canada and whose rights have not been extinguished in legislation or "superseded by law."

We recommend that the process should be open to all aboriginal groups that continue to use and to occupy traditional lands and whose aboriginal title to such lands has not been dealt with by land-cession treaty or by explicit legislation. We cannot accept that aboriginal peoples should have their land rights taken or superseded without their consent.

We recommend a new policy based upon a relationship of sharing of power and resources. The previous pattern of land and cash settlements would be far simpler, because it is easier to negotiate and deliver terms related to cash or areas of land, in which amounts are quantified and dates are established for the transfer. A transfer of power, however, is far more difficult to achieve. To be prepared to give up jurisdiction and to change its own decision-making structures is one of the most difficult challenges for any institution the size of the Government of Canada. Such a change will require your support and that of your colleagues in Cabinet every day.

The alternative is to return to strictly land and cash deals and long delays in settlement, which both we and the aboriginal groups find unacceptable. The result will be a ticket into the lottery of litigation, which not only is expensive but also, by its adversarial nature, creates bitterness and frustration. Judicial decisions result in winners and losers. A loss for government could prove very expensive; a loss for an aboriginal group would indeed be a Pyrrhic victory for government. The federal government still would have to settle with the aboriginal peoples but, after victory in the courts, it would be as conquerors dealing with the vanquished. The results of such one-sided negotiations are all around us---they did not work 100 years ago and they will not work today. Agreements, fairly negotiated and entered into freely, with the consent of all parties, are far preferable to decisions imposed after lengthy, bitter, and costly court battles.

Negotiations during the last twelve years have had disappointing results, and seemingly endless time, energy, and resources have been spent. We recommend the appointment of an independent commissioner to monitor the claims process for fairness and progress, to assist in the negotiations if problems arise, and to report annually to the House of Commons Standing Committee on Indian Affairs and Northern Development.

We also recommend that, before formal negotiations begin, early agreement be reached on the agenda, the timing for negotiations, the funding for the aboriginal group, and the process of ratification. Such agreement, which we call a "framework agreement," should improve the climate for negotiations and would establish a schedule for their completion.

We were unable to undertake detailed projections of the cost of our recommendations, but, clearly, the proposed comprehensive claims policy has financial implications for the federal government. In spite of the current financial difficulties of the Government of Canada, we recommend broadening the criteria for access to the process and increasing the number of claims in active negotiation at any one time, which will increase costs in the short term. Other recommended

changes will, however, make the process more efficient and lower the cost of negotiations. Also, if the government is prepared to share the revenues from future development with aboriginal groups, the direct costs of settlements could be lowered.

Some of the responsibility for the failures of the last twelve years rests with the federal government. A new comprehensive claims policy and changes to the process of negotiation are only part of the solution. A firm commitment by the government is required if real progress is to be made.

We considered recommending legislation to enact the claims policy to give it the backing of Parliament. Although we believe parliamentary support would require government departments to give the policy a higher priority, we were persuaded that debate in Parliament at this time would take time and resources away from negotiations and would delay agreements further.

Action taken on other issues has shown that, when motivated, the federal government can co-ordinate action among departments and can get the job done in a timely fashion. However, similar action has yet to occur in land claims negotiations.

There are now six groups in negotiations, with fifteen waiting to begin. Seven others have submitted claims that have not yet been accepted for negotiation. At the current rate of settlement it could be another 100 years before all the claims have been addressed.

The complex mechanism of government tends to move slowly. Negotiations may involve several departments, and although the claims process is a priority for your department, it may not be for others. Even within your department, the issue of comprehensive claims is only one of many urgent issues demanding attention. The government, particularly those departments that are directly involved, must consider a new policy carefully. Time spent now to ensure the acceptance of a new policy throughout every department of the government will save years of wasted time and resources. Once a policy has been accepted, the government must state clearly its own commitment to it and must maintain the political will required to achieve settlements.

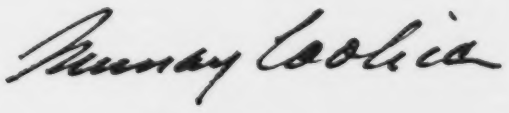
People may ask what a new comprehensive claims policy offers to all Canadians or why it is in the national interest. The answers are clear. Canada will be enriched if aboriginal peoples become contributors to Canadian life, rather than wards dependent upon the state. The economies of the regions of the country will be stronger if their aboriginal communities are strong and healthy. Economic growth often has been dampened or new development delayed by the uncertainty of unresolved land claims. Agreements will resolve the uncertainty and will allow both aboriginal and non-aboriginal Canadians to benefit from new economic development.

Throughout our history, federal government policies have encouraged the assimilation of aboriginal peoples into Canadian society, but these policies have failed. Aboriginal peoples have proved to be remarkably tenacious; their communities have persisted as distinct societies with their own cultures and traditions.

Statistics on health care, education, crime, or income levels tell a story of aboriginal peoples living at the lowest levels of our society. In spite of this reality, in meeting after meeting, aboriginal leaders spoke of their desire to build a new relationship with Canada---a relationship based upon sharing, respect, and a vision of the future. We believe that it is in Canada's interest to respond in a similar fashion. We should not forget history, for its lessons direct us to meet this challenge and to work together towards a new relationship based upon mutual respect and sharing.

To build this new relationship will require co-operative and creative negotiations; the parties will have to be prepared to share both power and resources. However, the results will make the cost and effort worthwhile. Aboriginal communities should have this opportunity to become contributors to Canada, as distinct, prosperous, and non-dependent societies within Confederation.

Yours sincerely,



Murray Coolican
Chairman

PREFACE

Comprehensive claims agreements are the continuation of a process that has been evolving for more than two centuries. At the heart of that process is an effort to work out mutually agreeable terms with the aboriginal peoples in Canada for sharing the country's land and resources and for participating in a common citizenship.

Our task force was appointed in July 1985 by the Honourable David Crombie, Minister of Indian Affairs and Northern Development, to "conduct a fundamental review of the federal comprehensive claims policy." This is our final report to the minister.

SCOPE OF THE REPORT

Our report begins by tracing the background of aboriginal claims agreements in Canadian history and law and by analysing the new constitutional context in which contemporary land claims policy must be made. Chapter 2 considers the connection between claims negotiations and other processes through which Canada's aboriginal peoples are seeking to establish a new relationship with Canada. Chapter 3 contains the framework of the policy that we believe should guide the federal government in reaching and implementing comprehensive claims agreements with aboriginal groups. Chapter 4 discusses in detail the substance of the proposed comprehensive claims policy, and chapter 5 focuses on the issues of process. Chapter 6 expresses our views on what is at stake for Canada in the successful resolution of aboriginal claims.

TERMINOLOGY

A number of terms in this report may require a word of explanation.

During our deliberations, we were impressed time and again by the diversity of the aboriginal peoples of Canada. These differences should be cherished, for they add immeasurably to the cultural richness of our country. Although we appreciate the significance of such differences, it is impossible to reflect them in this report in any detail.

We have used a variety of terms to refer to the descendants of the aboriginal inhabitants of this land---Indians, Inuit, and Métis. For the most part, we have used the general terms aboriginal, indigenous, and original people(s), inhabitants, nation(s), group(s), society(ies), and community(ies) interchangeably.

Throughout the report, we refer to land(s) and resources. Unless the context suggests otherwise, these expressions are used in a general way. The term land usually is intended to include waters, whereas resources usually refers to the products of both land and water.

The rights of aboriginal peoples are described in a variety of ways. As the report itself explains, the courts also have used several terms to refer to these rights. The following are used interchangeably: Indian title, interest; aboriginal title, right(s), land rights, interest, and claims; and original title.

The term aboriginal interest is used in two contexts. In the narrow context, described in the preceding paragraph, it is synonymous with aboriginal rights, title, and so on. In a broader context, it refers to the social, economic, and other concerns of aboriginal communities that go beyond legal conceptions of aboriginal rights.

Reference sometimes is made to the claims of the aboriginal groups. We are aware that many aboriginal people find this term offensive. Because their rights predate those authorized by colonizing powers, they resent the implication that they have the burden of establishing the validity of such rights. Nevertheless, we have sometimes used expressions such as claims, claimed area, claims process, and claimant groups. We have done so for two reasons. First, section 35(3) of the Constitution Act, 1982 uses the term land claims agreements. Because agreements negotiated pursuant to the proposed policy are entitled to constitutional protection under section 35(3), it seems appropriate to reflect this constitutional language. Secondly, the claims parlance is commonly understood, and we found it difficult to communicate our ideas succinctly without making occasional reference to it. Our use of these terms should not be taken as rejection of the view of their rights put forward by aboriginal groups.

Our report refers to land claims agreements at various stages. We do not mention final agreements because, as the report explains, we have approached land claims agreements as a method of defining the relationship between aboriginal peoples and other Canadians, and not as once-and-for-all arrangements. Instead, we describe framework agreements, sub-agreements, and complete agreements. Framework agreements (as explained in chapter 5) will set the agenda for substantive negotiations. Sub-agreements will deal with specific subjects that may be capable of implementation at an early stage of negotiation, and complete agreements will be determined at the end of substantive negotiations, and will provide the means for determining future arrangements.

Task Force to Review Comprehensive Claims Policy

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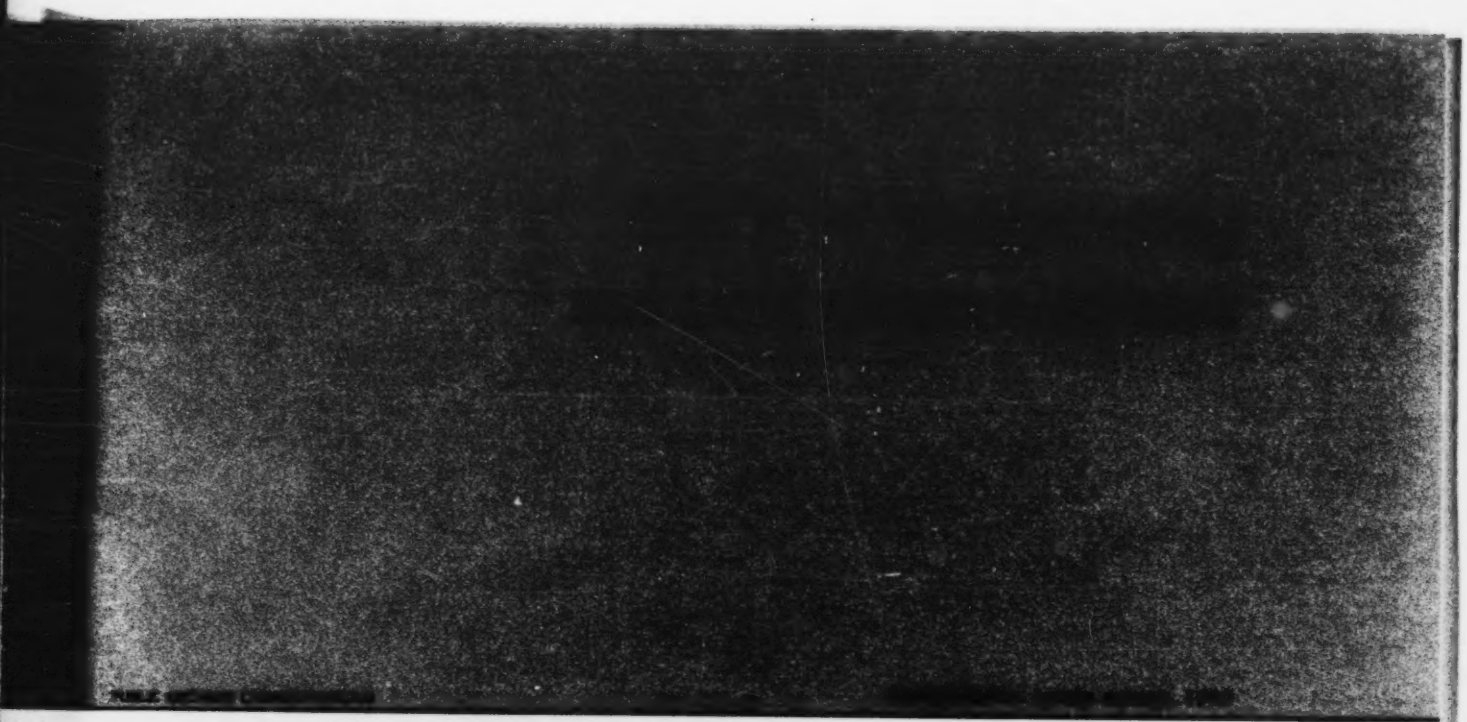


CHAPTER 1 HISTORY OF TREATY-MAKING AND LAND CLAIMS PROCESSES*

TREATY MAKING

Treaty making has deep historical roots, so the process of dealing with aboriginal title and rights through formal agreement is by no means a new phenomenon.

Before the arrival of Europeans, aboriginal communities were both self-governing and self-sustaining. Indians provided assistance to European newcomers who, to survive in North America, depended on the goodwill of the Indians. The fur trade was seen as mutually beneficial even though it significantly altered traditional aboriginal economic, social, and cultural patterns. Trade began to flourish as the Indians, who were the primary users of the land, traded the products of renewable resource harvesting for European-made goods.

Since the time of the first contact, Europeans and Indian peoples in North America have entered into agreements in an effort to reconcile or accommodate their divergent interests and aspirations. The earliest treaties were signed to formalize military alliances with the Indian nations. When the colonial powers became more firmly established in North America, they sought to assert greater control over the land and, through settlement, to exploit the resources more directly. Treaties involving land became more important and commonplace when the Europeans' desire for private ownership and exclusive use of the land conflicted with Indian hunting, trapping, and other traditional uses of it. By entering into these treaties, the government formally recognized the existence of Indian political

* The task force gratefully acknowledges the staff of the Treaties and Historical Research Centre, Self-Government Program, DIAND, for their review of this chapter.

communities and of their interest in the land, and implicitly recognized the social, economic, and political rights of the Indian peoples.

Treaty making was based on the principle of obtaining the consent of aboriginal groups. Because of the great imbalance in power and the difficulties in communication between the Europeans and Indian peoples, however, the basis for genuine negotiation and consent did not always exist.

Eastern and Central Canada

In 1725, the British entered into the first peace and friendship treaty with the Indians in Nova Scotia following a pattern they had established with the Indians in New England. In an environment of continual warfare between the rival colonial powers of England and France, these treaties were intended to secure the neutrality or assistance of the Indian nations. In exchange, the Crown agreed to facilitate Indian trade and to prevent the hindrance of Indians in their traditional pursuits of hunting, trapping, and fishing. These agreements, which did not include the surrender of land, were intended to stabilize relations with the Indian peoples to further the economic and military objectives of the colonial power.

The French did not enter into agreements dealing with Indian title to the land either, but they did make agreements resembling the peace and friendship treaties concluded by the British in Nova Scotia.

In 1763, France ceded all of its possessions in North America to Britain in the Treaty of Paris. In the same year, the British Crown issued a royal proclamation that declared that all lands to be acquired for future settlement in British North America were first to be cleared of Indian title by the Crown. The proclamation marked an important turning point on the issue of aboriginal title: it described a process that required the consent of the Indian peoples affected before the Crown could acquire clear title to their lands.

The years following the proclamation continued to be turbulent as the American colonies struggled to gain their independence from Britain. After the Revolutionary War, the Crown concluded a number of land-cession agreements with Indians in southern Ontario to assist the settlement of United Empire Loyalists, as well as to fulfil promises of land grants made to its Iroquois allies in recognition of their military service. These agreements generally included lump-sum payments and later annuities that were intended to clear the Indian title to the land.

In northern Ontario, in the area north of lakes Superior and Huron, the Robinson—Superior Treaty and the Robinson—Huron Treaty were concluded in 1850 to clear aboriginal title for the development of minerals. These treaties, which were known as the "Robinson treaties," provided for reserves, annuities, and the freedom to hunt and fish on unoccupied Crown land.

Prairies and the North

The British North America Act (section 91(24)) gave the federal government jurisdiction over Indians and lands reserved for Indians. After Confederation, the government undertook a process of clearing aboriginal title to facilitate the construction of a railway to the west coast and the expansion and consolidation of Canada through settlement.

In August 1871, the first two of the eleven numbered treaties were signed between aboriginal groups and the Crown in right of Canada. In treaties 1 and 2, which covered the area that is now southern Manitoba, the federal government expected the Indians to adopt farming rather than to continue traditional pursuits; they were given farm implements and seeds, but there was no mention of hunting, trapping, and fishing rights in the texts of these treaties.

Treaties 3 through 7 covered the lands that the federal government anticipated would be needed for the construction of the Canadian Pacific Railway, other transportation routes, and settlement of the prairies. Treaty 8, which covered the Athabasca District, provided an overland route to gold-fields in the Yukon Territory. Treaty 9 opened up transportation routes through northern Ontario, and Treaty 10 cleared title in the newly formed provinces of Saskatchewan and Alberta.

Although the federal government recognized that the terms of the prairie treaties would be inappropriate for the northern territories, Treaty 11 was concluded in the Mackenzie District in 1921, immediately after the discovery of oil at Fort Norman in 1920. The Indians in the area refused to choose reserve lands, and most of the provisions for reserves in the hastily concluded treaty remained unimplemented. Questions about the validity of the treaty were raised almost immediately and were the subject of litigation more than fifty years later when a major pipeline project in the Mackenzie Valley was proposed.

In the numbered treaties, the Indians surrendered all title to the lands covered by the treaties and, in turn, the federal government granted tracts of land to the Indians for reserves. This practice was a significant departure from some pre-Confederation treaties, which had not extinguished all title but rather had allowed Indian nations to reserve their title to certain areas.

Treaties 1 to 11 varied in specifics, but they generally included provisions for reserve lands; once-and-for-all payments in money and goods (often related to farming activities); recurring payments of goods such as ammunition, twine, and clothing; annuities; education; and continued traditional use by the Indians of ceded lands. Treaty commissioners were under general instructions from the federal government to minimize commitments of gratuities and annuities. They usually left Ottawa with a prepared format and presented the treaty to the Indian nation on a take-it-or-leave-it basis. Although the commissioners conceded some exceptions to the standard package, for example, the inclusion of a medicine chest in Treaty 6, the people involved had little bargaining power.

One element that was common to many of the treaties concluded both before and after Confederation was the provision of hunting and fishing rights.

The federal government assumed that it was in the best interests of the Indians that they be "civilized" and assimilated. The terms of the treaties included the provision of tools for agriculture, to help the Indians to adopt the ways of European settlers. The government acknowledged the importance of economic self-sufficiency, but thought that Indians should earn their livelihood in exactly the same ways as did the European settlers.

The government attempted to settle the northwest Métis claims and grievances primarily through legislation and orders in council. Because it was uncertain how to distinguish between Indians and Métis, in Treaty 1 it offered individuals a choice between accepting treaty as Indians or scrip as Métis. This practice was extended in some other western treaties. In response to Métis petitions, a number of half-breed commissions were formed to deal with Métis claims beyond Manitoba. These commissions determined how benefits were to be allocated, and operated jointly with, or in parallel to, treaty commissions in the North and the West.

After the initial round of treaty making, the federal government continued to seek adhesions to add Indians and their lands to existing treaties in an attempt to remedy oversights and irregularities in the treaty-making process and to ensure that title was indeed cleared in the areas needed for development. The task of "finishing up" the treaty-making process has continued to the present.

British Columbia

In British Columbia, James Douglas, a chief factor for the Hudson's Bay Company and second governor of Vancouver Island, made several agreements with Indian nations between 1850 and 1854 through the company, which had a grant to establish a colony on Vancouver Island. In the fourteen "purchases," or "deeds of conveyances," as they were described, land was exchanged for lump-sum payments (usually blankets)

and freedom to hunt and fish on unoccupied lands. The agreements, which generally were concluded to clear title to land needed for settlement or for mineral development, also provided for the reserving of lands by Indian nations for their exclusive use.

Although treaty making did not continue in British Columbia after 1854, Douglas maintained a policy of allotting reserve lands to Indian nations. His policy was altered substantially, however, when Joseph Trutch assumed responsibility for lands and works in 1864. Trutch, who maintained that Indians had no rights to land at all, applied the policy of allotting reserve lands less generously.

When British Columbia joined Confederation in 1871, article 13 of the terms of union stated that the federal government would assume responsibility for Indians and lands reserved for Indian peoples and would continue an Indian policy "as liberal" as that of the colony. The provincial government was required to convey lands needed by the federal government in the implementation of its Indian policy.

After Confederation, the federal government maintained a policy of clearing title through treaty making in the prairies, and apparently favoured a similar approach in British Columbia. In 1872, however, Trutch wrote to Prime Minister John A. Macdonald advising him that Canada's policy on treaty making was not appropriate for British Columbia.

Since that time, the Government of Canada and the British Columbia government have been unable to agree on how to deal with the issue of Indian title. With the exception of Treaty 8 in the north-eastern corner of British Columbia, there have been no agreements with the Indians of British Columbia to extinguish aboriginal title since the Douglas treaties in the early 1850s.

Modern Treaties

Modern claims agreements follow the pattern established by treaty making, although they are much more complex and comprehensive than the treaties. Three claims agreements have been signed since the federal government's policy statement in 1973. The James Bay and Northern Quebec Agreement in 1975 and the Northeastern Quebec Agreement in 1978 cleared title for the construction of hydro-electric power projects in the James Bay area. The Inuvialuit of the western Arctic, feeling the pressure from accelerated exploration for oil and gas in the Beaufort Sea area, filed a separate claim from the Inuit in the central and eastern Arctic in 1977. They signed an agreement in principle with the federal government in 1978, and the final agreement in 1984.

The federal government has consistently approached agreements with aboriginal groups, whether they were treaties or modern land claims agreements, with the objective of finality. It has aimed to

secure clear title to the land for development and to guarantee that no future claim based upon aboriginal title could be made upon the land. Although the government has expected that aboriginal peoples eventually would be absorbed into the dominant society, it also has felt obligated to protect them from the negative consequences of rapid social and cultural change until they have been assimilated.

Usually, aboriginal peoples have approached the agreements as vehicles for the recognition of their unique historical position as the original inhabitants of Canada and for the provision of guarantees for their continued social and cultural distinctiveness in the future.

Given the different expectations of the signatories, it is not surprising that the terms of the agreements have been the subject of continuing debate.

Almost as soon as the treaties were signed, grievances were expressed. Four years after the signing of treaties 1 and 2, the oral promises of the treaty commissioner were added to the written terms of the treaties in response to protests from the Indians. To resolve the disputes and uncertainties concerning pre-Confederation land cessions in southern and central Ontario, the federal government found it necessary to conclude the Chippewa and Mississauga agreements in 1923. In 1973, the Dene of the Mackenzie Valley filed a caveat on land in the Northwest Territories asserting that treaties 8 and 11 were fraudulent and had not extinguished their title. Often, failure to fulfil the literal terms of the treaty has been the subject of a claim, as in the case of the government's failure to provide ammunition specified under the terms of Treaty 7.

Modern agreements have not been much more successful. In a review of the implementation of the James Bay and Northern Quebec Agreement, the Department of Indian Affairs and Northern Development (DIAND) found that "there have been serious problems of implementation, unresolved disputes, and in some cases a failure to fully implement the Agreement in both its spirit and letter" (DIAND 1982, p. 9).

The recent report Village Journey, by Thomas Berger, on the problems associated with the Alaska settlement of 1971, further demonstrates that agreements are not regarded as final unless they are working satisfactorily. The Alaska settlement, which included more land and cash compensation than any other land claims agreement in North America, now requires revision less than twenty years after it was signed.

To date, treaties and modern settlements have provided neither the finality desired by government nor the guarantee for the future desired by aboriginal peoples.

ABORIGINAL TITLE AND THE LAW

Canadian jurisprudence recognizes the existence of aboriginal title under common law. It has been referred to as aboriginal title, aboriginal rights, original title, or Indian title. Although the concept of aboriginal title has been the subject of considerable judicial commentary, its characteristics have yet to be defined clearly. At times, the courts have described it as a "burden" upon, or qualification of, the Crown's title, as "usufructuary" in nature, as "personal" in the sense that it cannot be alienated except by surrender to the Crown, as a right of occupation, and as a right of possession.

Debate concerning the existence and precise nature of aboriginal title can be traced back to the sixteenth century, when Spanish theologians first considered the basic questions inspired by the concept. Their considerations were further developed in British colonial policy and later in American case law.

One of the earliest expressions of British colonial policy regarding the treatment and recognition of North America's aboriginal inhabitants was the Royal Proclamation of 1763. The proclamation established a consensual process for the acquisition of lands from aboriginal inhabitants. It clearly recognized that aboriginal peoples had legal and original possession of their lands and that the proper process of acquisition was the surrender of title by them and a purchase by the Crown.

The Royal Proclamation of 1763, as part of the Constitution of Canada, is included in a schedule to the Constitution Act, 1982. It was referred to recently by Mr Justice Dickson [now Chief Justice Dickson] of the Supreme Court of Canada in Guerin v. The Queen as the source of a fiduciary obligation owed by the Crown to Indians. According to Mr Justice Dickson, this obligation was assumed by the Crown in 1763 when it began to interpose itself between aboriginals and prospective purchasers of their land by accepting a surrender of title from the Indians and then by acting on their behalf.

Canadian judicial consideration of the concept of aboriginal title was preceded by the development of the concept in the Supreme Court of the United States. To formulate their judgments on aboriginal law, Canadian courts have drawn from these early American decisions.

Two of the most important American cases on aboriginal title are Johnson v. M'Intosh and Worcester v. The State of Georgia, decided by the Supreme Court of the United States in 1823 and 1832, respectively. These cases stand for the principle that aboriginal title is a legally recognized right to occupy and possess those lands held by Indians. The decisions also established that the legal title of the land went to the discovering state, subject to the aboriginal right of occupation and possession; that aboriginal title is further limited by

the fact that alienation can be made solely to the state or Crown; and that aboriginal title can be extinguished only through either conquest or cession and purchase.

The first major Canadian case dealing with the concept of aboriginal title was St. Catherine's Milling and Lumber Company v. The Queen, reported in 1889. The Judicial Committee of the Privy Council determined that in respect to Indian title, the underlying title was vested in the Crown; that alienation could be made only to the Crown; and that extinguishment was the Crown's exclusive right through surrender or otherwise.

In modern times, one of the most significant pronouncements on aboriginal title by the Supreme Court of Canada is the decision in Calder et al. v. Attorney-General of British Columbia. Six of the seven justices who heard the case acknowledged the existence of aboriginal title in Canadian law; however, the six split evenly on the issue of whether or not aboriginal title continues to exist in British Columbia.

In November 1984, in Guerin v. The Queen, the majority of the Supreme Court of Canada re-affirmed the existence of aboriginal title and underscored the duty of the federal government, as fiduciary, to protect such rights.

The actual content of aboriginal title is still uncertain, as demonstrated clearly in the statement of Mr Justice Dickson in the Guerin judgment:

> [I]n describing what constitutes a unique interest in land the courts have almost inevitably found themselves applying a somewhat inappropriate terminology drawn from general property law....
>
> Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right.... The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact

> that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading.
>
> (Guerin v. The Queen, p. 382.)

The method of extinguishing aboriginal title also remains unresolved. In the Calder case the court divided on the issue of whether or not aboriginal title had been extinguished as a result of pre-Confederation proclamations and ordinances issued by the governor of British Columbia. These legislative and executive instruments declared that all lands in British Columbia belonged to the Crown in fee, and provided for the disposition of lands without regard to Indian assertions of aboriginal title.

Because there was a split among the justices, however, no clear law on the issue emerged from the case. Two of the justices concurred with Mr Justice Judson's view that the passage of these legislative and executive acts demonstrated the exercise of jurisdiction over the land by a sovereign authority in a manner inconsistent with the continued existence of aboriginal title. In contrast, Mr Justice Hall, with whom two other justices also concurred, held that without a clear and plain intention to extinguish it in the legislative and executive enactments, aboriginal title continues to exist.

In the Guerin case, the court offered some indirect comment on this matter by stating that the method of transferring Indian interest in land to a third party is through the surrender process described in the Royal Proclamation of 1763, and that this process is firmly established regardless of whether the lands in question are reserve lands or lands subject to unextinguished aboriginal title.

On 21 November 1985, the Supreme Court of Canada handed down its decision in Simon v. The Queen, which dealt with whether or not treaty rights pursuant to section 88 of the Indian Act could continue to exist in the face of conflicting provincial legislation. In considering the issue of extinguishment, Chief Justice Dickson wrote:

> Given the serious and far-reaching consequences of a finding that a treaty right has been extinguished, it seems appropriate to demand strict proof of

> the fact of extinguishment in each case where the issue arises. As Douglas J. said in United States v. Sante Fe Pacific Ry. Co.,... "extinguishment cannot be lightly implied."
>
> (Simon v. The Queen, pp. 21—22.)

His statement adds another page on aboriginal law to a "book" that is far from complete.

The continuing legal debate as to the content of aboriginal title and the method of its extinguishment illustrates the courts' reluctance to deal conclusively with these complex matters. Indeed, a recent decision of Mr Justice Macfarlane of the British Columbia Court of Appeal expresses the view that questions of aboriginal title are dealt with best in a political, rather than in a legal, forum:

> I think it fair to say that, in the end, the public anticipates that the claims will be resolved by negotiation and by settlement. This judicial proceeding is but a small part of the whole of a process which will ultimately find its solution in a reasonable exchange between governments and the Indian nations.
>
> (MacMillan Bloedel Limited v. Mullin et al., p. 607.)

EVOLUTION OF COMPREHENSIVE CLAIMS POLICY

Momentum for the resolution of long-standing claims gathered during the years following the Second World War. The implementation of the treaties and the administration of the Indian Act had resulted in many grievances and claims against the federal government. The government's response had tended to be ad hoc and somewhat unsystematic and Indian people often had been forced to take their claims to court.

In 1927, section 141 of the Indian Act had prohibited Indian people from either raising money for the advancement of a land claim, or prosecuting claims to land, or retaining a lawyer. In 1950, John

Diefenbaker argued for repeal of section 141 and suggested the establishment of an independent claims commission similar to the Indian Claims Commission in the United States. In 1951, however, the minister of Indian Affairs did not agree that a claims commission was appropriate for Canada because American claims were for compensation, whereas in Canada most claims were for traditional harvesting rights, which, in his view, could continue to be handled by the courts. Furthermore, he noted that section 141 was not included in the revised Indian Act of 1951.

A joint committee of Parliament that reviewed Indian policy from 1959 to 1961 again recommended the establishment of a claims commission. The Conservative government adopted the idea and prepared legislation for Parliament's consideration. The proposed commission would not apply the Statute of Limitations or strict evidenciary rules of procedure. Although it would have a mandate neither to re-negotiate treaties nor to deal with claimants who were not defined as Indians, the commission could consider claims based on pre-Confederation events.

That government fell before the proposed legislation could be introduced into Parliament; however, in 1963, the Liberal administration modified the earlier Conservative proposal and re-introduced legislation for a claims commission. The legislation called for the commission to make decisions rather than recommendations and it allowed for appeal to the Exchequer Court of Canada, or to the Supreme Court of Canada, or to an Indian claims appeal court that was to be established along with the commission.

The bill was re-introduced in 1965 after eighteen months of consultation with Indian people, but died on the order paper when an election was called. The federal government subsequently delayed action on the proposed legislation because of continuing controversy about the mandate of the commission. Nevertheless, the idea of a claims commission was still alive when the government began to formulate its statement on Indian policy (White Paper Policy) in 1968.

In 1969, the post-war momentum behind the resolution of claims based on aboriginal rights was lost. The White Paper Policy [Statement of the Government of Canada on Indian Policy] called for a dramatic shift in the historical relationship between Indian peoples and the Canadian government. Although the government indicated that it would be prepared to resolve "lawful obligations," such as improper administration of Indian funds and breach of treaty rights, including failure to set aside reserves as promised in treaties, it did not regard claims based on aboriginal rights as an important element of the proposed new policy. The policy essentially called for the termination of the special rights and status of aboriginal peoples within Canadian society. The destiny of Canada's aboriginal peoples was to be no more and no less than equal access to the ordinary rights and opportunities of other Canadians. The policy was resoundingly rejected by the aboriginal groups, and as a result of its introduction their relations with the federal government suffered a serious setback.

As part of the White Paper Policy, Dr Lloyd Barber was appointed Commissioner on Indian Claims, and held that office until 1977. However, his limited mandate was restricted "to review and study grievances concerning Indian claims" (Commissioner on Indian Claims 1977, p. iii).

The Calder decision in 1973 precipitated a reassessment of the federal government's policy on claims and of its position on aboriginal rights. In that decision, there was a clear statement on the existence of aboriginal title from the highest court in the land. Six Supreme Court justices agreed on the existence of aboriginal rights in Canadian law, although they were split on the issue of whether or not title had been extinguished in the specific case of the Nishga Indians.

The federal government could no longer ignore claims based on aboriginal rights. When the issues were debated in the House of Commons in April 1973, following the Calder decision, opposition parties supported aboriginal groups in pressing for the resolution of claims. Flora MacDonald supported the recognition of aboriginal rights and the need to achieve a fair settlement of aboriginal claims in a statement on 11 April:

> [T]he Prime Minister said at the time of the Nishga judgment: "Perhaps you had more legal rights than we thought you had when we did the white paper." We give wholehearted recognition to the concept of aboriginal rights....
>
> The Progressive Conservative Party undertakes to settle fairly the outstanding aboriginal claims of Canada's native people.
>
> (House of Commons 1973, p. 3207.)

In August 1973, the federal government responded to widespread demands for the resolution of outstanding claims with a policy statement (DIAND 1973). The statement indicated that the government would negotiate settlements with aboriginal groups where rights of traditional use and occupancy had been neither extinguished by treaty nor superseded by law. These claims were later described as "comprehensive." The policy also identified a process for dealing with "specific claims," claims relating to outstanding lawful obligations of the federal government arising from its failure to live up to the terms of the treaties, to fulfil its obligations under the Indian Act, or to discharge properly its responsibility for reserve lands. The goal of the specific claims process is to remedy these grievances. "Claims of a different character" also were mentioned in the policy statement, but the federal government identified no mechanism for dealing with them.

Since the 1973 policy statement, three comprehensive claims agreements have been signed: the James Bay and Northern Quebec Agreement in 1975; the Northeastern Quebec Agreement in 1978; and the Inuvialuit Final Agreement in 1984.

The federal government has limited to six the number of negotiations that may proceed at one time, and is now negotiating comprehensive claims with the Council for Yukon Indians, the Dene/Métis of the Northwest Territories, the Tungavik Federation of Nunavut (TFN), the Nishga Tribal Council, the Conseil Attikamek—Montagnais, and the Labrador Inuit Association. Another fifteen claims, thirteen of which are in British Columbia, have been accepted and await negotiation. Seven claims are under review and several others are anticipated in British Columbia. Three claims have been rejected on the basis of their having been superseded by law.

Since the establishment of the Office of Native Claims in 1974, more than twenty-six million dollars have been spent on the operation and management of the claims process (including both comprehensive and specific claims). Loans to claimant groups for the development and negotiation of comprehensive claims have totalled about ninety-four million dollars (of which about fifteen million dollars have been repaid by groups that have signed final agreements).

The claims policy called for the exchange of undefined aboriginal land rights for concrete rights and benefits that would be guaranteed by settlement legislation. The agreements themselves were to include lands, cash compensation, economic development, wildlife rights, and self-government at a local level. However, in spite of more than a decade of negotiating, little progress has been made in the settlement of claims. Settlements have been achieved only when the federal government was eager to facilitate an economic development project.

Several factors have contributed to the difficulties in reaching agreements. One of the most significant obstacles has been the insistence of the federal government on finality and on the blanket extinguishment of all aboriginal rights. Other difficulties have resulted from the government's refusal to include political rights, decision-making power on land and resource management boards, revenue sharing from surface and subsurface resources, and offshore rights in the negotiations.

In 1981, the federal government's claims policy was restated and clarified in the booklet In All Fairness. In the few years following, a great deal has happened to alter significantly the environment in which negotiations take place.

RECENT DEVELOPMENTS IN ABORIGINAL RIGHTS

The entrenchment of aboriginal and treaty rights in the Constitution Act, 1982 reflected growing acceptance by Canadians of the fact that aboriginal peoples occupy a unique and permanent place within Canadian society. It signalled the beginning of a new era in relations between governments and aboriginal groups in Canada.

The Constitution of Canada now recognizes and affirms existing aboriginal and treaty rights. The Constitution Amendment Proclamation, 1983 makes it clear that "treaty rights" include "rights that now exist by way of land claims agreements or may be so acquired" (Canada 1984a, section 35(3)). This entrenchment of aboriginal rights represents a turning point in Canada's treatment of its aboriginal peoples. No longer can the Parliament of Canada unilaterally extinguish or modify aboriginal rights. Changes in existing aboriginal rights require the consent of the aboriginal groups concerned or a constitutional amendment.

The Constitution also provides for the convening of first ministers' conferences at which there will be discussions with representatives of Canada's aboriginal peoples concerning the further definition of aboriginal rights in the Constitution. These conferences represent a commitment by the governments in Canada to treat Canada's aboriginal peoples as partners in Confederation.

Because the Government of Quebec did not agree with the accord leading to the Constitution Act, 1982, it did not support the Constitution Amendment Proclamation, 1983, but Quebec's support of aboriginal rights and its willingness to participate in land claims agreements is demonstrated clearly by the National Assembly's 1985 resolution on the recognition of aboriginal rights. That resolution urges the Government of Quebec to conclude agreements with aboriginal peoples in the province covering such matters as "the right to self-government" and "the right to own and control land" (Quebec 1985, p. 2).

When we bear in mind that the Constitution Act, 1982 and the Constitution Amendment Proclamation, 1983 were supported by all the provinces except Quebec, these independent actions by Quebec make it clear that all ten of Canada's provinces and the federal government now recognize aboriginal rights and the treaty status of rights acquired through land claims agreements.

The report of the Special Committee of the House of Commons on Indian Self-Government (the Penner Report), which was released in October 1983, called for the constitutional entrenchment of the principle of self-government and for the enactment of federal legislation to establish self-government within its jurisdiction over "Indians and lands reserved for Indians." The report also called for changes in the administration of the Department of Indian Affairs and Northern Development to facilitate the development of self-government.

The report of the special committee already has had a profound effect on the policies of the current federal government. Early in 1985, the government proposed a constitutional amendment on aboriginal self-government, and has announced its intent to proceed with non-constitutional self-government initiatives.

Prime Minister Mulroney stated his government's support for the objective of self-government for aboriginal groups in his opening statement at the first ministers' conference in April 1985:

> As a Canadian and as Prime Minister, I fully recognize and agree with the emphasis that the aboriginal peoples place on having their special rights inserted into the highest law of the land, protected from arbitrary legislative action. Constitutional protection for the principle of self-government is an overriding objective because it is the constitutional manifestation of a relationship, an unbreakable social contract between aboriginal peoples and their governments.
>
> In seeking constitutional change, I recognize that this alone cannot resolve social and economic problems. Constitutional change is not enough to reduce disparities and correct injustices. Rather, improvements to the economic and social circumstances of aboriginal peoples must be pursued at the same time as changes to our Constitution are sought to define the rights of aboriginal peoples. Action is required on both fronts and these two sets of endeavours, while separate, are mutually supportive.
>
> (First Ministers' Conference 1985, pp. 6—7.)

Formulated before the entrenchment of aboriginal rights in the Constitution, before the special committee on self-government, and before other recent developments in this area, the current claims policy, In All Fairness, clearly requires change to reflect recent progress on these issues, and to reflect the principles that now form the basis of the federal government's policy towards aboriginal peoples.

At the April 1985 first ministers' conference, Prime Minister Mulroney identified the work of this task force to examine the process of claims settlement and to consider alternatives to current policy as one of the "critical initiatives" that "underpin our constitutional discussions and root them in reality" (ibid., p. 8).

Conclusion

Canada's wealth has been generated from the land and resources that aboriginal groups agreed to share with the growing nation, yet aboriginal peoples have had little opportunity to share in the benefits and have been caught in a legal and policy framework that has perpetuated a relationship of debilitating dependency. The social and economic conditions of aboriginal peoples still fall short of those enjoyed by most other Canadians. The human costs associated with this situation are reflected not only in shorter life expectancy for aboriginals, but also in higher rates of infant mortality and violent death, and in a rate of suicide more than twice as high as that for non-aboriginals.

Aboriginal peoples have never accepted the notion that the price of their well-being in the land of their ancestors was the abandonment of their cultural distinctiveness and special aboriginal status. Through centuries of social and economic hardship and a sustained government policy of assimilation, their deep sense of aboriginal identity has remained remarkably strong, and their communities have survived.

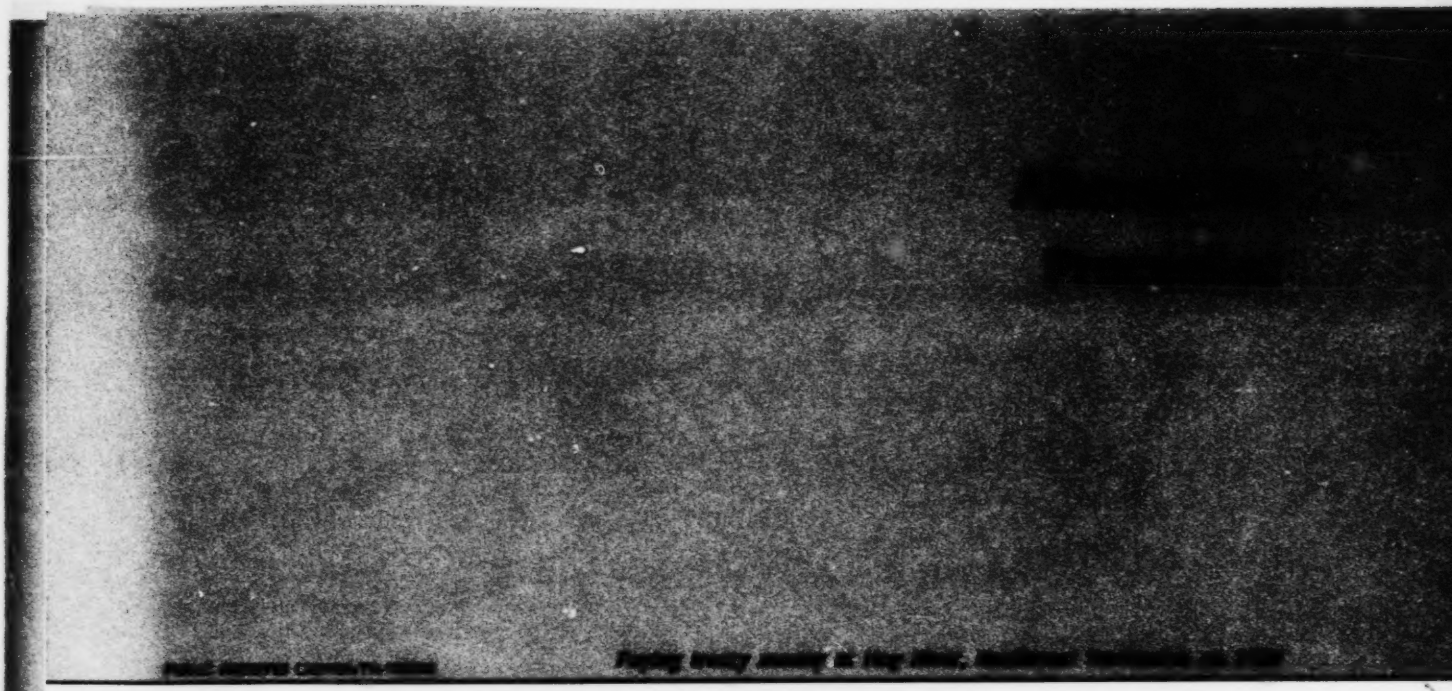
Canada still has an opportunity to make lasting agreements with aboriginal peoples based on the recognition and affirmation of their aboriginal rights and with respect for their unique and enduring place in Canadian society.

Lloyd Barber's tenure as Commissioner on Indian Claims contributed to a greater understanding of the issues surrounding land claims. In a speech to the Whitehorse Chamber of Commerce in 1975, Mr Barber said:

> I would urge the Government and native people to strive for an agreement which is flexible enough to permit the necessary positive evolution. I don't think anyone can draw out a detailed master plan for the future, and the settlement terms should provide the greatest possible latitude for change. Rigidities may only lead to a new set of problems.
>
> In conclusion, I would suggest to you that the negotiations on land claims

> provide an unprecedented opportunity to get at some of the important, deeply rooted problems and differences between Indians and non-Indians, and work out a basis for a more productive and harmonious future. If the negotiations are superficial, or based on criteria which do not really reflect the needs and concerns of the people affected on both sides, they will certainly fail. This is the time for hard thinking, frank dialogue and imaginative approaches. If the difficult and uncomfortable points are skirted, success will not be achieved.
>
> (Barber 1975, p. 12.)

Dr Barber's statement remains as valid today as it was a decade ago.



CHAPTER 2 ALTERNATIVE PROCESSES

Until recently, the comprehensive claims process represented the only opportunity for aboriginal peoples to negotiate new arrangements with the federal government. Other processes, although not yet as well defined, hold the promise of meeting the desire of aboriginal peoples for a new deal and of becoming feasible alternatives to the comprehensive claims process.

The constitutional talks are seeking to define aboriginal rights. The report of the Special Committee of the House of Commons on Indian Self-Government (the Penner Report), which is supported by all political parties, made recommendations to bring about Indian self-government. The federal government intends to pursue negotiations on self-government with individual bands. Several provincial governments already have taken initiatives to develop arrangements with aboriginal peoples for their self-government. The federal government also has begun to explore the renovation of existing treaties to ensure that both their spirit and letter are applied today.

As well, both the Northwest Territories and Yukon are embarking upon discussions that will lead to the devolution of powers from the federal to the territorial governments. In the Northwest Territories, a plebiscite has supported the division of the territories. Two groups, the Nunavut Constitutional Forum and the Western Constitutional Forum, with direct representation from the aboriginal peoples concerned, are leading the debate in the North on the boundaries and the political institutions of the new territories.

The objectives of aboriginal peoples in all these processes are similar. They seek a new relationship with Canada and the opportunity to build strong economies and to control decisions that affect their lives. Comprehensive claims agreements remain the most attractive process for most aboriginal groups because of their breadth and because the agreements can be protected under section 35(3) of the Constitution. Progress in the other processes, however, may enhance their feasibility as alternatives to the comprehensive claims process.

SELF-GOVERNMENT AND THE CONSTITUTION

The Constitution of Canada recognizes and affirms the unique rights and special status of Indian, Inuit, and Métis peoples within the Canadian Confederation. Except by constitutional amendment, it appears that these rights cannot be altered or amended without the consent of the aboriginal peoples. Many aboriginal groups and constitutional experts maintain that the aboriginal rights recognized and affirmed in section 35(1) of the Constitution Act, 1982 embody two general categories: first, the right to land, and secondly, the right to determine what happens on that land; in other words, self-government. Within these categories there is room for a broad variety of rights; however, neither category is, at present, clearly or fully defined in Canadian law.

Section 37 of the Constitution provides for the convening of first ministers' conferences to discuss the definition of aboriginal rights in the Constitution with representatives of Canada's aboriginal peoples. Representatives of the federal and provincial governments and the aboriginal peoples have agreed to discuss, within the first ministers' conference forum, the right to self-government; however, a series of meetings has, as yet, been unable to produce agreement on a definition.

At the first ministers' conference in April 1985, the Government of Canada initially proposed a constitutional amendment to entrench a process for the negotiation of constitutionally protected agreements on self-government with all aboriginal peoples of Canada. The first ministers' conference scheduled for 1987 will provide another opportunity to reach agreement on an amendment on self-government.

The Special Committee of the House of Commons on Indian Self-Government advocated that self-government be achieved through two related mechanisms. In its report, the committee recommended that the right of Indian peoples to self-government should be stated explicitly and entrenched in the Constitution of Canada and that the federal government should pass legislation enabling it to enter into agreements with aboriginal governments concerning the jurisdiction of each.

The minister of Indian Affairs and Northern Development, the Honourable David Crombie, has indicated that he will negotiate agreements on self-government with Indian bands on matters within federal jurisdiction pursuant to section 91(24) of the Constitution. An agreement recently concluded with a band in British Columbia transfers authority currently administered by the federal government under the Indian Act to the band. The British Columbia government has participated in these arrangements.

The Constitution, the continuing constitutional discussions on aboriginal rights and self-government, and the federal government's policy on self-government have profound implications for comprehensive claims. Most importantly, comprehensive claims policy should be consistent with the recognition and affirmation of aboriginal rights. The policy should not seek to extinguish, in claims negotiations, rights that the Constitution has so recently affirmed.

To deal adequately with land, agreements must address the question of the right to determine what happens on that land. Land and the jurisdiction over it are bound up inseparably with the preservation of aboriginal societies as distinct, self-sufficient, social orders within Canada. This distinction applies particularly to aboriginal societies whose economies, religions, political systems, education systems, and family relations are established by reference to their traditional lands. An integrated approach will ensure that the claims process is not simply a real estate transaction.

In practical terms, the separation of land rights negotiations from negotiations or discussions on self-government would be far more costly than an integrated approach and would give rise to a myriad of strategic and planning problems.

The agreements negotiated in any comprehensive claims process will receive constitutional protection under section 35(3) of the Constitution Act, which specifically refers to "rights that now exist by way of land claims agreements or may be so acquired" (Canada 1984a, p. 1582). Although they will receive constitutional protection under section 35(3), such agreements cannot be considered a substitute for constitutional agreement on the definition of aboriginal rights or the entrenchment of self-government. Land claims agreements and treaties protect only the rights of the parties to them, and, indeed, can be amended with the consent of the parties to them, whereas a constitutional amendment entrenching self-government could be amended only under the constitutional amending formula. Entrenchment of self-government as an aboriginal right would, thus, apply to all aboriginal peoples and not just to the groups that are a party to a claims agreement.

At present, comprehensive claims agreements offer the only opportunity for constitutional protection of agreements with government. For this reason, aboriginal groups favour the comprehensive claims process as a means of negotiating a new relationship with the government. A constitutional amendment on self-government could provide an attractive alternative to the comprehensive claims process, which already suffers from an unacceptable backlog of groups awaiting negotiation.

NORTHERN POLITICAL DEVELOPMENT

Political development in Canada's two northern territories is complex, as it involves the evolution of the territories towards some form of responsible government and, perhaps, even to provincehood. It also includes the devolution of powers and administrative responsibilities from the federal government to the territorial governments. In the Northwest Territories, political development is complicated further by the prospect of division of the territory into two: Nunavut in the eastern Arctic and a western territory as yet unnamed.

The role of the comprehensive claims negotiations in political development is equally complex. The federal government has taken the position that political development should not be a part of claims negotiations or agreements. The current claims policy restricts claims negotiations to non-political matters although it allows for the possible inclusion of "self-government on a local basis" (DIAND 1981, p. 19).

There is a precedent for the negotiation of regional public governments in the claims process. In the James Bay and Northern Quebec Agreement (JBNQA) and the Northeastern Quebec Agreement (NEQA), Quebec Inuit opted for a form of public government through the Kativik Regional Government, which was established later by provincial legislation. The other aboriginal parties to the agreements, the Crees and the Naskapis, chose a form of Indian government based on existing band council structures, which was set out in federal legislation, the Cree--Naskapi (of Quebec) Act, in 1984.

Aboriginal groups in the North have taken the position that their aspirations for self-government are achieved best through forms of public government. This choice reflects the unique circumstances in the North, where the reserve system never was imposed and where Inuit, who are not subject to the Indian Act, do not have any form of government analogous to band councils under the Indian Act. Inuit have always maintained that political development should be negotiated through the claims process. Indeed, the creation of Nunavut was proposed first as part of the Inuit land claims proposal in 1976. The Dene presented a similar proposal for public government in Denendeh, in 1978. The Inuvialuit proposed the creation of a Western Arctic Regional Municipality (WARM), which was included in their agreement in principle in 1978, but which was dropped in the final agreement signed in 1984.

In the North, the aboriginal groups argue that they cannot sign claims agreements without some assurance of the role their peoples will play in public government. Others argue that forms of public government should not be negotiated behind closed doors in a forum where the territorial government does not have third-party status.

In Yukon, the Yukon Territorial Government, the federal government, and the Council for Yukon Indians are negotiating a memorandum of understanding on the relationship of the claims process to constitutional development and devolution.

In the Northwest Territories, the Constitutional Alliance of the Northwest Territories (composed of members of the Legislative Assembly and aboriginal groups) is discussing the issue of a boundary for division of the territory. The Nunavut Constitutional Forum and the Western Constitutional Forum, as members of the Constitutional Alliance, are developing separate proposals for constitutional development in the new territories that would be created by division. As in Yukon, the relationship between the processes of land claims and political development in the Northwest Territories should be addressed through negotiations between aboriginal groups, the territorial government, and the federal government.

It is crucial that what is negotiated in the claims process be compatible with what is agreed upon in the constitutional development process. Some mechanism for integrating and co-ordinating these processes is therefore required. Two memoranda of understanding should be negotiated: one for the Tungavik Federation of Nunavut claim, and the other for the Dene—Métis claim.

The following principles for "sorting" issues into the different processes may be helpful to those negotiating a memorandum of understanding.

1. Participants should determine which self-government issues are to be discussed in the claims process.

2. The claims process should allow at least for the negotiation of forms of local and regional self-government in areas where aboriginal people constitute a significant majority of the population.

3. Aboriginal people should be able to negotiate their participation on decision-making boards that have jurisdiction over the entire claim area when the decisions of such boards directly affect their aboriginal interests, for example, fish and wildlife management boards.

4. Matters that go beyond these broad limits should be addressed in the public meetings that have been set up to develop constitutional proposals.

The process of claims negotiation need not be delayed unduly pending the outcome of deliberations on constitutional development. If the parties were to agree on the principles of a right to local and regional government where appropriate, they could negotiate the details with the federal and relevant territorial government at a

later date, which is precisely what occurred under the JBNQA and NEQA. The details of participation of aboriginals on decision-making management boards, however, likely would be a priority in negotiation because of the direct relationship of wildlife and land-use issues to land.

In principle, the form of the Nunavut government in the claims process could be negotiated if the proposed boundary for Nunavut were to correspond directly to the Tungavik Federation of Nunavut (TFN) claim area, where Inuit constitute a significant majority of the population. The Inuit wish, however, to have the western Arctic included within Nunavut. Thus, the TFN would be negotiating matters affecting peoples and land beyond its claim area. Several other political factors preclude such an approach. Because the Government of the Northwest Territories (GNWT) is not a third party to negotiations, and because negotiations are conducted in private, it could be argued that the public would not be represented adequately in the negotiations. However, there should be no limit as to what aspects of constitutional development are discussed in the claims process, even though specific provisions for the form of the new territorial government would not be finally settled in that forum.

It should be noted that if aboriginal groups do not wish to negotiate issues of self-government during the claims process, they are under no obligation to do so. The advantage to doing so is that the arrangements would receive constitutional protection and then would not be vulnerable to demographic changes in the North.

The devolution of powers to the territorial governments will directly affect any negotiation of self-government in the claims process. Thus, no further devolution of powers should occur without the full participation and consent of the aboriginal peoples. A process for consultation on devolution should be part of the memoranda of understanding.

CHAPTER 3 FRAMEWORK FOR A NEW COMPREHENSIVE CLAIMS POLICY

A new federal government policy for the settlement of comprehensive claims must recognize the fundamental principles of the Canadian political system. It also must establish objectives that are consistent with the national interest, and, to have any chance of success, its aims must be compatible with those of aboriginal groups who seek a just and fair settlement of their claims.

PRINCIPLES

The evolution and development of the Canadian political system has been guided by several fundamental principles, with which the comprehensive claims policy must be consistent. These principles mean that the Government of Canada has a responsibility to

- protect the civil and political rights of individuals;
- respect the collective rights of cultural minorities;
- function co-operatively with other levels of government;
- maintain the territorial integrity of Canada;
- exercise effective Canadian sovereignty over the entire Canadian territory;
- ensure political and social stability within Canada; and
- promote economic prosperity within Canada.

Throughout this report, we have kept these principles in mind in setting the broad limits within which the policy for comprehensive claims must be made.

AIMS

Canada's interest in claims policy has two facets. First, it is in the national interest to encourage the cultural and economic development of aboriginal communities as strong, confident, and distinctive societies within Confederation. Secondly, it also is in the national interest to provide a climate suitable for the economic growth of Canada to the benefit of all Canadians. Determining the national interest in claims policy is a complex and difficult task, but the objectives that we recommend for a new policy meet both interests.

In negotiations, progress has, in the past, been blocked by the fundamental difference between the aims of each party. The federal government has sought to extinguish rights and to achieve a once-and-for-all settlement of historical claims. The aboriginal peoples, on the other hand, have sought to affirm their aboriginal rights and to guarantee their unique place in Canadian society for generations to come. The aims of the government and the aboriginal peoples must be more compatible, so that the agreements achieved will help both parties to realize their aspirations. The objectives for the proposed policy recognize the aims of aboriginal peoples and, at the same time, protect the interests of the Government of Canada.

Objectives

The objectives of the proposed comprehensive claims policy should be to reach agreements that

- define the relationship between governments and aboriginal peoples in Canada;
- establish a framework of certainty concerning land and resources that accommodates the interests of aboriginal peoples and other Canadians;
- provide the opportunity for the development of economically viable aboriginal societies;

- preserve and enhance the cultural and social well-being of aboriginal societies for generations to come; and

- enable aboriginal societies to develop self-governing institutions and to participate effectively in decisions that affect their interests.

These objectives should guide the federal government in the negotiations to ensure that claims settlements provide a solid foundation for the future.

The blanket extinguishment of all aboriginal rights and title should no longer be an objective.

Principles

To achieve the objectives of the proposed comprehensive claims policy, our recommendations are based upon fifteen principles.

1. Agreements should recognize and affirm aboriginal rights.

2. The policy should allow for the negotiation of aboriginal self-government.

3. Agreements should be flexible enough to ensure that their objectives are being achieved. They should provide sufficient certainty to protect the rights of all parties in relation to land and resources, and to facilitate investment and development.

4. The process should be open to all aboriginal peoples who continue to use and to occupy traditional lands and whose aboriginal title to such lands has not been dealt with either by a land-cession treaty or by explicit legislation.

5. The policy should allow for variation between, and within, regions based on differences in historical, political, economic, and cultural differences.

6. Parity among agreements should not necessarily mean that their contents are identical.

7. Given the comprehensive nature of agreements and the division of powers between governments under the Canadian Constitution, the provincial and territorial governments should be encouraged to participate in negotiations. The participation of the provinces will be necessary in the negotiation of matters directly affecting the exercise of their jurisdiction.

8. The scope of negotiations should include all issues that will facilitate the achievement of the objectives of the claims policy.

9. Agreements should enable aboriginal peoples and the government to share both the responsibility for the management of land and resources and the benefits from their use.

10. Existing third-party interests should be dealt with equitably.

11. Settlements should be reached through negotiated agreements.

12. The claims process should be fair and expeditious.

13. An authority independent of the negotiating parties should be established to monitor the process for fairness and progress, and to ensure its accountability to the public.

14. The process should be supported by government structures that separate the functions of facilitating the process and negotiating the terms of agreements.

15. The policy should provide for effective implementation of agreements.

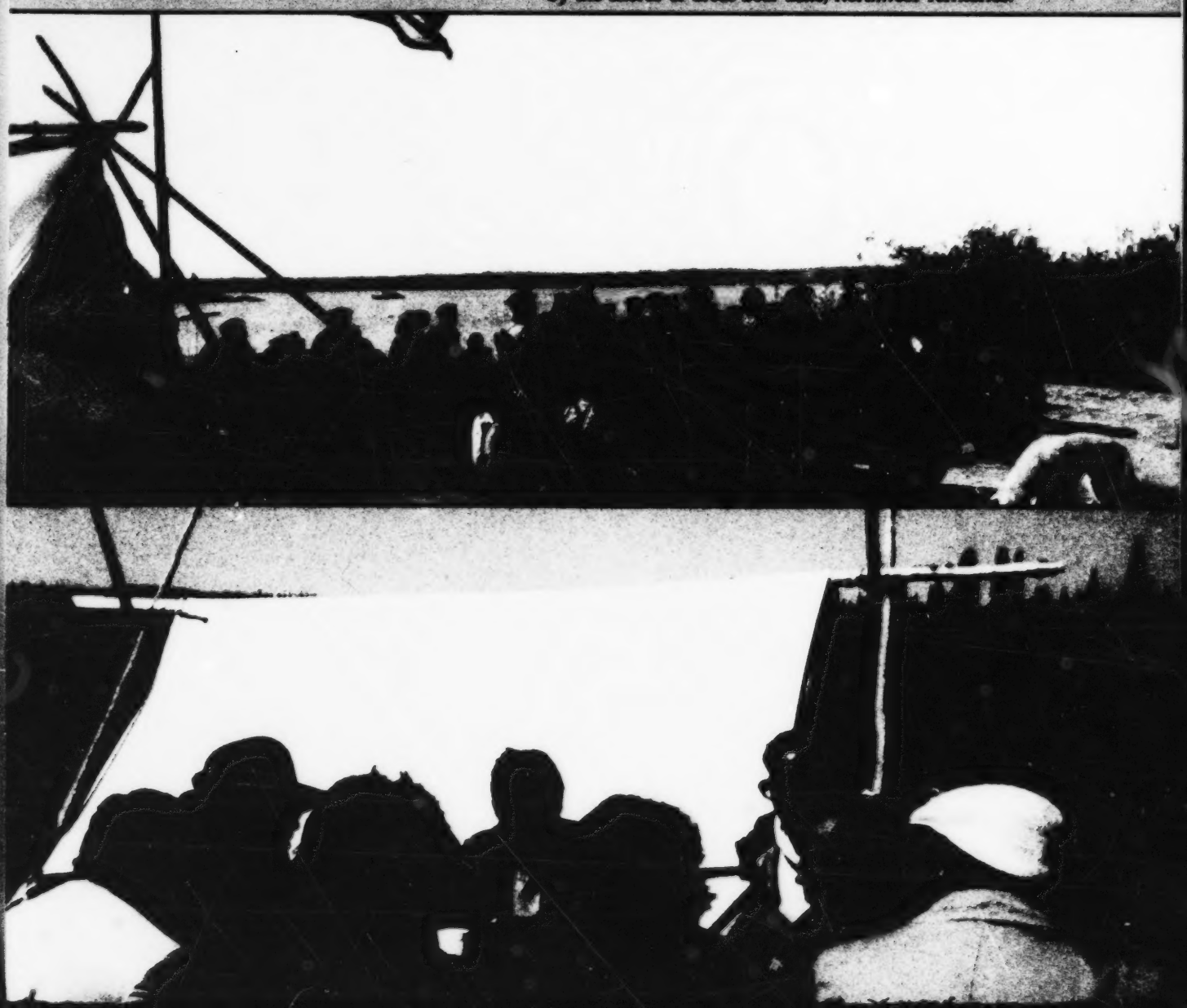
Proposed Comprehensive Claims Policy

Above:

PUBLIC ARCHIVES CANADA/PA-112909 *Paying treaty money at Yellowknife settlement, Northwest Territories, ca. 1924*

Below:

Negotiating Dene-Metis claim, Fort Franklin, July 10, 1985
Indian and Northern Affairs Minister David Crombie and his chief of staff, Ronald L. Doering, discuss a claim with Bob Overvold, chief negotiator for the Dene-Metis, by the shores of Great Bear Lake, Northwest Territories.



CHAPTER 4 PROPOSED COMPREHENSIVE CLAIMS POLICY

CERTAINTY, FLEXIBILITY, AND THE AFFIRMATION OF ABORIGINAL RIGHTS

History has shown that agreements with aboriginal groups in North America are final only when they work satisfactorily. Aboriginal peoples, whose ancestors signed treaties a century ago, now seek to renovate those agreements and to apply them in today's context. Such agreements may have appeared just and reasonable when they were signed, but they now leave most aboriginals on the margin of Canadian society. The Alaska Native Claims Settlement Act, barely fifteen years old, provides a more recent example, which already has been found wanting. If, despite the best intentions, we cannot anticipate the effects of these arrangements a decade and a half hence, how can we predict the future needs of successive generations?

An apparent objective of post-Confederation treaties and modern claims agreements has been the final settlement of all aboriginal claims. Legally, this goal has been achieved through the blanket surrender-of-rights clause that appeared in the numbered treaties, and that was combined with a sweeping provision for the extinguishment of rights in the later James Bay and COPE [Committee for Original People's Entitlement] agreements. In practice, finality has never been achieved. The federal government is now faced with many petitions to restore the spirit of previous agreements, which are no less compelling by virtue of their grounding in arguments of social and moral justice rather than in law. Agreements set in legal concrete have left a residue of frustration and bitterness. Today's agreements must aspire to more positive and lasting results.

Aboriginal leaders are understandably concerned about the effects that their decisions will have on the lives of successive generations of their peoples. Recent policy has offered only two

options: either to sign a final agreement that extinguishes all aboriginal rights or to do nothing, thereby preserving present legal rights however ill-defined they may be. It is hardly surprising that the latter option has often been the more attractive.

We propose a third option in which agreements would be flexible, would provide certainty as to land, resources, and selected other matters, and would affirm and acknowledge aboriginal rights.

It might be argued that Canadian society will gain very little by entering into agreements with aboriginal groups that are not final and that fail to resolve the issue of aboriginal rights. One important flaw in this argument is the assumption that aboriginal rights relate only to land. The judicial definition of aboriginal rights is still evolving. So, too, is the definition of aboriginal rights through the process set out in section 37 of the Constitution Act.

Most aboriginal peoples understand their aboriginal rights to embrace land as well as cultural, social, religious, linguistic, and political matters. The equivalent rights of other Canadians have never been defined for all time, because it is accepted that these rights will grow and change with new aspirations and circumstances. Thus, the rights of aboriginal peoples also should be capable of alteration, adjustment, and adaptation.

Comprehensive claims agreements must achieve certainty in relation to land and resources, which is in the interests of all parties: the aboriginal groups, governments, and third parties. Although aboriginal peoples themselves have a clear conception of the meaning of their aboriginal rights, Canada's legal system has not always provided protection, and the status quo as to land and resources has not served anyone's interests. Governments have often proceeded as though aboriginal rights did not exist. In the face of major investments in land and resources, however, both government and third parties have suffered from the legal uncertainty that accompanies the failure to deal with aboriginal rights.

We believe that comprehensive agreements should provide frameworks through which the relationship of aboriginals and other Canadians can be defined and renewed over time. Although certainty also may be desirable for financial compensation and some other aspects of agreements, it should be required only when it is essential.

The question of how comprehensive claims agreements can affirm and acknowledge aboriginal rights while providing certainty as to land and resources for all parties is one to which we have devoted considerable time. A few observations about the legal and constitutional background of aboriginal rights will help to set the context for some possible solutions.

As we have seen, colonial policy recognized that aboriginal rights had to be dealt with by consent. In the early treaties, aboriginal groups surrendered some rights specific to certain areas, yet retained other rights relating to their whole territory.

Consider, for example, the language of the Robinson—Huron and Robinson—Superior treaties, entered into before Confederation:

> the said Chiefs...do...surrender, cede, grant and convey unto Her Majesty...all their right, title and interest in the whole of the territory above described, save and except the reservations set forth in the schedule hereunto annexed....(Emphasis added.)
>
> (Canada 1905, 1:147.)

Through this provision, the Indians surrendered their aboriginal title to some areas and reserved their aboriginal title to others. In addition, they retained the right to hunt and fish throughout the ceded territory. Moreover, they preserved the possibility of sharing in the benefits of the ceded territory if it "shall at any future period produce an amount which will enable the Government of this Province, without incurring loss, to increase the annuity hereby secured..."(ibid., p. 148).

The language of the Douglas treaties on Vancouver Island is similar. There, the Indians surrendered land to Governor James Douglas, it being a condition of the sale that:

> our village sites and enclosed fields are to be kept for our own use, for the use of our children, and for those who may follow after us.... [I]t is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly.
>
> (Madill 1984, p. 67.)

Thus, before Confederation, certainty as to land and resources was achieved when aboriginal groups surrendered limited areas of land to the Crown, yet reserved other lands to themselves and retained rights in relation to their whole territory.

After Confederation, a new method of dealing with aboriginal rights came into practice in the numbered treaties, which contained the following formulation:

> the Indians...do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada... all their rights, titles and privileges whatsoever, to the lands included within the following limits....
>
> (Cumming and Mickenberg 1972, p. 314.)

In return, the federal government granted back to the Indians reserve lands carved out of the ceded area, as well as harvesting rights over their traditional territory. In contrast to the pre-Confederation approach, the Indian rights now flowed from the treaty, rather than from the retained aboriginal title and rights. This change, although subtle, is extremely important to aboriginal peoples. Instead of the surrender and reservation of the pre-Confederation era, clear title to aboriginal lands was now obtained through a complete surrender of all rights and a granting back of more limited rights.

Neither the pre-Confederation treaties nor the numbered treaties were authorized originally through legislation, but rather by order in council. Specific reference to the extinguishment of aboriginal rights is found in the post-Confederation legislation that dealt with the Indian title of the Métis in Manitoba. The language of extinguishment also is found in the Alaska Native Claims Settlement Act, which cleared aboriginal title through a process that was not strictly consensual.

The James Bay and Northern Quebec Agreement (JBNQA) drew upon both the surrender--grant-back approach of the numbered treaties and the extinguishment language of the legislated settlements. Clause 2.1 of the agreement declares that:

> the James Bay Crees and the Inuit of Quebec hereby cede, release, surrender and convey all their Native claims, rights, titles and interests, whatever they may be, in and to land in the Territory and in Quebec....(Emphasis added.)
>
> (JBNQA 1976, p. 13.)

Under clause 2.2,

> Quebec and Canada, the James Bay Energy Corporation, the James Bay Development Corporation and the Quebec Hydro-Electric Commission (Hydro-Quebec)... hereby give, grant, recognize and provide to the James Bay Crees and the Inuit of Quebec the rights, privileges and benefits specified herein.... (Emphasis added.)
>
> (ibid.)

In addition to this surrender—grant-back formulation, clause 2.6 provides that the enabling federal legislation

> shall extinguish all native claims, rights, title and interests of all Indians and all Inuit in and to the Territory....
>
> (ibid., p. 15.)

The Inuvialuit Final Agreement employs the same approach:

> [T]he Inuvialuit cede, release, surrender and convey all their aboriginal claims, rights, title and interests, whatever they may be, in and to the Northwest Territories and Yukon Territory and adjacent offshore areas,...(Emphasis added.)
>
> (DIAND 1984, clause 3(4), p. 3.)

> The Settlement Legislation approving, giving effect to and declaring valid this Agreement shall extinguish all aboriginal claims, rights, title and interests whatever they may be of all Inuvialuit.... (Emphasis added.)
>
> (ibid., clause 3(5), p. 3.)

> [The Settlement Legislation] shall provide that Canada recognizes and gives, grants and provides to the Inuvialuit the rights, privileges and benefits specified in this Agreement....(Emphasis added.)
>
> (ibid., clause 3(11), p. 3.)

Clearly, there has been a gradual but distinct change in the way in which aboriginal title has been extinguished in Canada. Before Confederation, it was considered sufficient if specific rights were surrendered voluntarily by the Indian peoples. The numbered treaties introduced the complete surrender—grant-back approach. In both instances, the act of surrender (whether of partial or total rights) by an Indian people effected an extinguishment of rights. In the modern agreements, an additional mechanism has been included, namely, the blanket extinguishment of all rights by the Crown, through a legislated clause.

There is a serious question as to whether a sweeping clause on extinguishment is necessary to clear the title in circumstances where a voluntary surrender of rights has been procured from the aboriginal people. From a non-aboriginal point of view, this issue may seem almost trivial, because, even if the extinguishment clause is not legally necessary to clear the title, it does not reduce the aboriginal rights by any greater degree than they have been reduced by the voluntary surrender of rights.

Yet, from an aboriginal point of view, the issue is fundamental. The sweeping extinguishment clause found in the modern agreements (which may not even be legally necessary to obtain certainty in relation to the land) is perceived as an expression of the federal government's wish to abolish their unique identity and to destroy all aboriginal rights. It may be accidental rather than purposeful policy that this result is achieved through language that may be legally excessive. In fact, the main objective is the clarification of land and resource rights. The recognition of aboriginal rights implicit in the pre-Confederation treaties has declined steadily towards a surrender and extinguishment of all rights in the modern agreements. To most non-aboriginals this progression is insignificant, in that it accomplishes the same result, namely, clarification of the land title.

To many aboriginals, aboriginal rights are intimately tied to culture and lifestyle and are integral to their self-identity. The blanket surrender and extinguishment of these rights suggests assimilation and cultural destruction. It is partly for these reasons that aboriginal groups fought so vigorously for the entrenchment of their rights in the Canadian Constitution.

The enactment of section 35 of the Constitution Act cast new light upon the issue of extinguishment. Under the pre-1982 law, the Crown could extinguish aboriginal rights legislatively without the consent of the aboriginal peoples. The elevation of aboriginal rights to a constitutional level has precluded such an approach in the future. It now appears that these rights may be altered in only one of two ways.

First, rights still can be altered with the consent of the aboriginal peoples. This method poses a grave problem for federal policy because, as we have seen, most aboriginal people reject the notion of losing all their aboriginal rights. Moreover, why would

Parliament recognize aboriginal rights in the most important constitutional document of the century, and then extinguish them by other means in the decades that follow?

Secondly, rights can be altered by constitutional amendment. Leaving aside the time and complexity that would be inherent in this, it is hard to imagine Canadian politicians undoing constitutional protection of such recent vintage.

Thus, if the proposed comprehensive claims policy is to succeed, alternatives to the blanket surrender—grant-back—extinguishment approach must be found. Several possibilities were suggested to us, some of which we rejected as unworkable.

Alternatives to Extinguishment

To be workable, an alternative to extinguishment must have at least four characteristics. First, it must be acceptable to the aboriginal people concerned, for their rights cannot be altered without their consent. Secondly, to encourage investment in, and development of, property rights, it must enable the granting of secure rights to lands and resources. Thirdly, it must be simple, because complex approaches promote legal uncertainty. Fourthly, it must be familiar, so that rights can be defined to fit comfortably into the dominant property law system.

Our proposals are presented as workable, but not exclusive, alternatives, for we believe that, once having removed the constraints of the existing approach, creative negotiators will devise other acceptable alternatives. Both government and aboriginal groups should be encouraged to propose other alternatives at the bargaining table provided that they meet all four of the foregoing criteria.

Because our proposals involve a change from the approach of the recent past, there will be resistance from some people. Detailed legal questions will be raised and will have to be addressed in the wording of any agreements that adopt one of these alternatives. Some may even view these changes as superficial. Whatever the criticisms, we believe that our proposals contribute positively to the debate on aboriginal rights in that they outline methods of dealing with rights other than the blanket surrender—grant-back—extinguishment approach used over the past decade.

One alternative would be to return to the legal technique of the pre-Confederation treaties. Starting from a broad recognition of aboriginal rights, it provides certainty through the surrender of limited rights in relation to particular areas. Thus, aboriginal groups might retain their aboriginal title or aspects of it in relation to certain traditional areas, and surrender it or parts of it in relation to other areas. At the same time they might retain other rights—such as wildlife harvesting rights, a partial interest in the subsurface, or revenue sharing entitlements—over the entire area.

When title or partial title is retained, they might wish to have their aboriginal land rights described in ways that are easily recognizable under Canada's legal system (for example, the form of tenure they hold). This description would provide certainty for their land rights within the system that defines the land rights of other Canadians. The acceptability of this approach in the negotiations will depend to some degree upon the nature and extent of rights that are to be retained, compared with those that are to be surrendered.

A second, related alternative, which could be used in combination with the one described above, is premised on the assumption that aboriginal rights have a much broader content than land-related rights (embracing matters such as cultural, social, political, linguistic, and religious rights). Thus, even if aboriginal title to land and resources is surrendered specifically, other rights that might eventually receive definition through the courts or constitutional processes could be preserved. Because some or all of these other rights might play no part in a land claims agreement, they would be unaffected by it. Certainty as to land and resources would be achieved, however, because the agreement would deal explicitly with aboriginal title to land and resources.

A third alternative would be to set aside the issue of aboriginal rights in land claims agreements. This might be appropriate when one of the parties to the agreement (such as a provincial government) refuses to admit that aboriginal rights exist. An approach similar to this has been used successfully in the context of offshore oil and gas rights. The federal and Nova Scotia governments held differing legal views as to their proprietary and legislative rights in relation to the offshore, but agreed to set these differences aside for the sake of a co-operative management regime, with neither party conceding its legal position. The agreement, which has a specified term and is intended to survive any judicial determination of the parties' rights, has been accepted by industry as sufficiently certain to permit large investments in offshore petroleum exploration and development.

This approach to aboriginal rights would leave unresolved the existence and content of these rights in a particular case. For the term of the agreement, the rights would be defined by the agreement itself. Parties to the agreement would retain the ability to litigate about their rights; however, in doing so, they would renounce all the rights defined within the agreement. Thus, as long as the satisfaction with the operation of the agreement was sufficiently high, there would be strong motivation to keep it working.

A major consideration under this approach would be the security that could be granted to third parties. They would need to be assured that rights granted to them pursuant to the agreements would be legally enforceable. Third parties that acquire rights in the Nova

Scotia offshore are content because they receive their rights from a joint federal—provincial board. One or other of the governments has the power to authorize activities and, because both have given their permission, the authorization cannot be attacked later.

A different concern might arise in the context of aboriginal rights. If an agreement fails and litigation is pursued successfully by an aboriginal group, it might wish to deny the validity of third-party rights granted during the term of the now-defunct agreement. Such an agreement could be drafted to preserve any third-party rights granted under its provisions, notwithstanding the subsequent abandonment of the agreement. We hope that such clauses would give adequate protection to third parties. This matter would have to be explored carefully in the design of any agreement.

A claims policy that requires a surrender and extinguishment of all aboriginal rights can, and must, be abandoned. It can be abandoned because, as we have shown, there are other methods for clearing title to the land. It must be abandoned because, if it is not, there will be no possibility of achieving land claims agreements based on common objectives.

Agreements should balance the need for certainty in the orderly development of land and resources with the need for flexibility in the evolving relationship between aboriginal groups and governments in Canada. In keeping with section 35 of the Constitution, agreements should recognize and affirm aboriginal rights.

CRITERIA FOR ACCESS

The Royal Proclamation of 1763 enunciated British colonial policy in the acquisition of Indian lands, and clearly established the principle of acquisition based on consent. The proclamation states:

> [I]f, at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie....
>
> (Canada 1970, p. 128.)

It also established a process whereby the acquisition of the land in question was made easier through the surrender of aboriginal title by the aboriginal group and purchase by the Crown.

In much of Canada, settlement was preceded by the acquisition of Indian lands by the Crown in accordance with the proclamation. This policy was not applied, however, in large regions such as British Columbia, north-eastern Quebec, Labrador, and the northern territories. It is primarily within these areas that aboriginal societies have asserted their title and are engaged in, or seek, comprehensive claims negotiations with the federal government.

Both within the regions described, and in other regions where the policy of acquiring aboriginal lands through consent was not observed, some aboriginal societies asserting aboriginal title to lands have been excluded from comprehensive claims negotiations. Their exclusion has been based on the notion that their aboriginal title has been "superseded by law." The Mohawks of Quebec, the Musqueam Band in British Columbia, and the Union of Nova Scotia Indians have been excluded on this basis. The federal government has considered claims based on aboriginal title to be superseded by law in instances in which, first, general legislation has paved the way for a pattern of settlement and third-party alienations inconsistent with continued aboriginal use and occupancy; and secondly, the aboriginal societies have ceased to use and to occupy the core area of their land in a traditional manner.

This concept first appeared as policy in the statement on claims of Indian and Inuit peoples on 8 August 1973 by the minister of Indian Affairs and Northern Development. The policy stated in part:

> In essence, these claims relate to the loss of traditional use and occupancy of lands in certain parts of Canada where Indian title was never extinguished by treaty or superseded by law.
>
> (DIAND 8 August 1973, p. 3.)

The development of a comprehensive claims policy was prompted by the Calder case, in which six of the seven justices of the Supreme Court acknowledged the existence of aboriginal title under Canadian law. The concept of "superseded by law" was drawn from the judgment of Mr Justice Judson, which was concurred with by two other justices. Mr Justice Hall, on the other hand, took the view that extinguishment can occur only with consent or by specific legislation. Subsequent decisions in lower courts have considered the issue, but it has not

been dealt with conclusively by the Supreme Court of Canada. The most recent language in a decision of the Supreme Court, in the Simon case, suggests that the onus of demonstrating extinguishment is upon those alleging extinguishment, and that the courts will require strict proof thereof. The proposition that aboriginal title can be implicitly superseded by law lacks a solid legal basis.

There have been certain situations in which the federal government has been prepared to negotiate despite the fact that a strict application of the superseded-by-law concept would bar the claims. For example, Mr Justice Judson concluded that Nishga aboriginal title had been superseded by law, yet the government has accepted the Nishga claim for negotiation. This demonstrates that even where legislation is inconsistent with the continued existence of aboriginal title, the government will engage in comprehensive claim negotiations if the aboriginal society in question has not given up its traditional lifestyle and if there is little in the way of actual settlement and alienation. The claims policy requires a very difficult, subjective judgment as to what constitutes a sufficient traditional use and occupancy to withstand supersession by law. As a result, the policy is open to uneven and inequitable application.

Canada's history of acquiring aboriginal title through land cession and purchase has established the principle of compensating aboriginal peoples for the cession of their lands, which is consistent with the common law principle of compensation for expropriation. The continued application of the superseded-by-law concept results in the denial to the aboriginal society of this well-established legal principle.

The application of this concept also results in the non-compliance with the firmly established practice of acquiring aboriginal title lands with aboriginal consent. In the Guerin case, a justice of the Supreme Court determined that this practice is firmly entrenched in the Royal Proclamation of 1763 and that the Crown obligated itself to maintain and observe the policy. Mr Justice Dickson [now Chief Justice Dickson] concluded that it is a responsibility that continues today in relation to reserve lands or unrecognized aboriginal title lands.

The superseded-by-law concept should no longer be applied to exclude from the comprehensive claims process those aboriginal societies that have not been a party to a treaty or the subjects of extinguishment legislation. Nor should it exclude those aboriginal societies that have engaged in treaty relations, but that have not specifically dealt with lands in those treaties. The proposed claims policy would enable the parties to negotiate an agreement based on consent in accordance with firmly established practice.

The comprehensive claims process should be open to all aboriginal societies that continue to use and occupy traditional lands and whose aboriginal title to such lands has not been dealt with by land-cession treaty or by explicit legislation. The policy should exclude only those groups that no longer live in their traditional area.

The proposed criteria for access would increase the number of claims that the federal government accepts for negotiation, which would, in turn, increase the long-term financial and human resources required to settle comprehensive claims. On the other hand, if the criteria are not broadened, and, with the recent trend towards litigation, the government will find itself in a costly and drawn-out adversarial process. Financial and human resources can be used better in the more positive and less adversarial process of negotiation.

With the addition of previously excluded groups to an already long list of groups waiting to negotiate, it would then be necessary to attach priorities to the claims.

Priority in the process should be given to those aboriginal societies that still engage in traditional activities over most of their traditional lands and that may be threatened by major development or third-party alienations.

There is still an opportunity to negotiate a truly comprehensive claims agreement with these groups before major development and third-party alienations threaten their lifestyle and their lands.

Although the criteria for access recommended for the proposed policy would exclude many aboriginal groups from the comprehensive claims process, there are other processes through which they can work out a new relationship with Canada.

The history and current situation of most Métis and non-status Indians is quite different from other aboriginal peoples. With the exception of the constitutional discussions and Alberta's provisions for Métis settlements, most Métis and non-status Indian groups have been excluded from the comprehensive claims policy and from other processes, such as treaty renovation and self-government negotiations with the federal government. Therefore, a separate policy and process should be developed by the government so that Métis and non-status Indians can negotiate with the government to remedy past injustice and to establish new relations.

REGIONAL VARIATIONS

The proposed comprehensive claims policy has been developed to provide a process for the resolution of the aboriginal land claims of groups that have not previously participated in land-cession agreements. At present, groups from diverse areas in the North, British Columbia, Labrador, and Quebec are involved in negotiations. It is anticipated that this diversity will continue.

The aboriginal groups from different regions have different interests, engage in different activities, have different beliefs and values, and live in different political contexts. So it is natural for them to focus on different aspects of aboriginal title as essential to ensure their existence and well-being.

We have been careful to avoid recommending a rigid policy that would preclude a diversity in settlement agreements depending on the aboriginal group and its geographical location. Indeed, the idea of leaving open the scope of negotiations for discussion would give the parties the opportunity to discuss items and matters that they consider to be appropriate for their negotiations.

An agreement that would be appropriate for an aboriginal group living north of 60° might not be appropriate for one in British Columbia or Quebec. For example, Inuit society, culture, and economy depend to a large degree on wildlife. Inuit emphasize that their participation in the harvesting of wildlife as well as in the preservation and conservation of wildlife is essential to their continued existence. On the other hand, for aboriginal groups in British Columbia, the fishery is important as both a traditional and an economic development activity, and their participation in its management is a key objective.

Not only is there regional diversity, but also there are significant differences between the aboriginal groups within a region. Thus, there should not be a standard list of negotiable items for each region of the country. For example, in British Columbia, coastal tribes have relied upon their traditional use of the resources from the sea rather than from the land, whereas inland tribes have relied on a combination of the forest, rivers, and soil for their existence.

In recommending that the scope of negotiations should include self-government and economic development, we recognize that it is the aboriginal groups themselves that can determine best how to become self-sufficient and self-governing. It is difficult, for example, for us to appreciate the importance and usefulness that Inuit place on their claims to the offshore and to the sea, especially because the offshore they have traditionally used is covered by land-fast ice for most of the year.

Of special importance in any claim agreement is the land component of the settlement. Some aboriginal groups in the northern regions of Canada are able to pursue traditional activities over vast areas of land simply because third-party interest in those lands is relatively limited. On lands in southern regions, however, third-party occupation prevents many aboriginal groups from practising their traditional harvesting activities. Because the extent and nature of land varies so dramatically from one part of the country to another, achieving parity in either extent or valuation of the lands in the settlements is virtually impossible.

We encourage the development of negotiation and settlement proposals that take into consideration matters such as the economic potential of the lands and resources; the nature of governmental jurisdiction over the lands, either shared federal and provincial or exclusive federal jurisdiction; the availability of wildlife and fishery; and the capacity of the aboriginal group to become self-governing.

The only measure that should be made of the claim agreement is whether or not the parties have achieved their aims and objectives. Valuation and attempts at parity between settlement agreements undermine the process. In encouraging a regional approach, we have dismissed the notion of developing a claim agreement model that could be applied uniformly to all the groups. All parties to the negotiations must be cognizant of both regional and inter-regional differences. All parties share the onus of developing and negotiating an agreement that accommodates the distinctive aspirations and context of each aboriginal society.

The claims policy should allow for variations between, and within, regions based on historical, political, economic, and cultural differences.

ROLE OF THE PROVINCES AND TERRITORIES

Where claims arise within a province, the participation of the province is vital to achieving truly comprehensive agreements. Provincial governments have an important stake in the economic and social well-being of aboriginal populations residing within their boundaries. These governments often benefit directly from the clarification of land and resource ownership that can be achieved as a result of a land claim agreement. The environment for resource development and related investment is likely to be improved once outstanding aboriginal claims have been settled.

The federal government should be prepared to demonstrate leadership in the settlement of aboriginal claims, in keeping both with its legislative powers under section 91(24) of the Constitution Act, and with its fiduciary obligation to aboriginal peoples and their

land recently enunciated by the Supreme Court of Canada in the Guerin case. The government should take the initiative in persuading provinces to become part of the negotiating process, and should exert its full powers of political and moral persuasion towards this end.

Both levels of government have a strong interest in approaching issues of common concern in a spirit of co-operation. It is essential that efforts aimed at co-operation be embarked upon in a timely fashion, so that the provincial governments can become engaged in the negotiations as early as possible. The quality of co-operative involvement would clearly be enhanced if the government parties were to agree on how the costs of any claim agreement would be allocated and on what the responsibilities of each government would be in the process.

An example of achievement through federal—provincial co-operation in aboriginal matters is found in the Indian Commission of Ontario (ICO). First established in 1978 as a result of tripartite arrangements between the two governments and the chiefs of Ontario, the ICO has provided a mechanism for the achievement of consensus on Indian issues. In its short history, it has demonstrated the advantages of federal--provincial co-operation in dealing with Indian concerns.

Despite success stories such as the ICO, the record of past federal--provincial co-operation in the negotiation of aboriginal claims is not without serious blemishes. Indeed, the federal government has not always done everything possible to procure provincial involvement in claims matters. A concerted effort by the federal government, at the highest political level necessary, should have a positive effect upon the willingness of provinces to co-operate.

In spite of the federal government's leadership, initiative, and persuasion, provincial governments still may refuse to participate in some negotiations, but the federal government should not hide behind such recalcitrance. If provincial co-operation cannot be secured within a reasonable time, the federal government should embark upon negotiations on matters within its own jurisdiction. To do otherwise would only encourage the litigation of claims.

Federal lands exist in all the provinces in which comprehensive claims have been asserted. Although such areas are relatively small compared with the size of provincial lands, they could still provide a modest starting-point for the establishment of a land base for aboriginal societies. Such federal lands also may be suitable for exchange with those belonging to a province. Furthermore, the federal government is free to negotiate other matters within its jurisdiction, such as aspects of fisheries use and management. If negotiations on federal matters go well, provincial governments may be motivated by the success and may be more inclined to participate.

Historically, the posture of the Province of British Columbia towards aboriginal claims has been a sore point both for aboriginal groups and for the federal government. The background to this issue is long and complex, and has created considerable acrimony on all sides. It seems, however, that the federal government has not consistently approached British Columbia with the positive, co-operative stance we advocate in this report. For example, British Columbia received virtually no advance notice of the change to federal claims policy announced by the federal government in August 1973, despite the enormous ramifications that the federal policy had for the province. In the future, the federal government should take pains to avoid precisely this sort of situation.

The stalemate in British Columbia has existed too long, yet the parties most detrimentally affected, namely, the claimant groups, have had the least power to break the deadlock.

Although the matter is not free from doubt, a good argument can be made, based upon the terms of union in 1871, that the Province of British Columbia has a constitutional obligation to participate in federal claims policy. Aboriginal title litigation launched by frustrated aboriginal groups is emerging throughout British Columbia, and may contribute to deteriorating relationships and hardened positions over the short term. The gravity of the situation in British Columbia for aboriginal groups has forced us to consider seriously whether the federal government should refer a question to the Supreme Court concerning the existence and extent of British Columbia's constitutional obligation.

At this time, we do not think that a reference by the federal government to the Supreme Court of Canada is the best alternative. The outcome of litigation is unpredictable; thus the process creates risks for both sides. Litigation is an extreme measure, and federal—provincial litigation should be pursued only when all other processes have been exhausted. The federal government has not yet done everything possible in relation to British Columbia, and, rather than commencing litigation, should focus attention upon finding creative, co-operative solutions to the impasse. Earlier, we set out three alternatives for dealing with aboriginal rights that might form a basis for renewed discussions with British Columbia. Recent initiatives by the ministers of Indian Affairs and Northern Development and of Environment and by the prime minister in response to the situation of the Haida Indians exemplify the type of committed, high-level approach to federal—provincial co-operation that should be pursued.

Territorial governments pose a different challenge for federal claims policy. Although there has been some devolution of authority to territorial governments, their powers remain those delegated from the federal government. They, too, have a vital stake in the outcome of negotiations, and their co-operation is essential to the achievement of successful claims agreements. Both territorial governments have been effective participants in recent negotiations,

and, unless aboriginal groups and the federal government agree that they should participate as independent parties, they should continue to participate as key members of the federal team.

Other important constitutional forces are at work in the territories, including division of the Northwest Territories and devolution. In discussions of these matters, territorial governments should continue to have full status as independent parties.

Throughout this section we have stressed that the co-operative involvement of provincial and territorial governments is an essential ingredient of a successful federal claims policy. These governments should be consulted as part of the federal government's review of this report prior to the implementation of any new federal claims policy.

The federal government should encourage provincial participation in claims negotiations where the comprehensive claims pertain to lands within a province. Before negotiations begin, the federal government should reach an understanding with the provincial government concerning the role and responsibilities of the government parties in the claims process and the allocation of the costs of any agreement. If, after a reasonable time, the province is unwilling to participate despite the federal government's best efforts, the federal government should pursue bilateral negotiations with the aboriginal group on matters within its own jurisdiction. In the North, the territorial governments should continue to participate in negotiations as part of the federal team.

CLAIMS THAT OVERLAP POLITICAL BOUNDARIES

Domestic Boundaries

Some aboriginal groups live in one province but their hunting and fishing areas extend into another jurisdiction. These groups are concerned that their rights in that jurisdiction should not be changed without their consent. For example, the James Bay and Northern Quebec Agreement extinguished all aboriginal rights within a specified area. As a result, the rights of the Labrador Inuit, who have hunted in northern Quebec, and of the Mo Cree Bec of Quebec, who now live in Ontario, were extinguished without their consent although they had not been party to the negotiations.

One of the principles of the proposed policy is that aboriginal rights should be altered only with consent. Thus, rights that an aboriginal group may claim in another jurisdiction should not be

subject to an agreement to which they have not consented. Any aboriginal group claiming rights to land across a provincial or territorial boundary, regardless of its place of residence, should not have its rights altered without its consent.

Some aboriginal groups live, and use the land, on both sides of a border. These groups want to negotiate as a group and not to be divided by the borders of others.

To help preserve and enhance the cultural well-being of the aboriginal community, the federal government should encourage and support the territorial integrity of aboriginal communities whose traditional territory crosses jurisdictional boundaries. We recognize, however, that separate agreements may have to be concluded on each side of the border so that the arrangements provided for are compatible with the institutions of the province or territory.

In recommending this approach, we suggest that it not be applied automatically to the groups currently involved in negotiations. The progress made to date should not be undermined. However, many problems could be avoided in future if the federal government were to take into account the territorial integrity of aboriginal societies when accepting a claim.

Although provincial and territorial governments have been reluctant to accord rights to non-residents of their province or territory, the COPE agreement recognized that the Inuvialuit of the Northwest Territories could exercise rights on their traditional lands located in Yukon. The Government of Quebec also has begun negotiations with the Labrador Inuit concerning the rights extinguished by the James Bay and Northern Quebec Agreement. The federal government should encourage the provincial and territorial governments to recognize the rights of non-resident claimants. Across the Yukon--British Columbia border some groups have begun discussion of reciprocal agreements that would allow groups on either side of the border to share certain provisions of their agreement. These reciprocal agreements should be encouraged to help resolve the difficulties of claims that overlap political boundaries. The federal policy should not restrict the range of benefits available to members of a claimant group who reside outside the jurisdiction in which the claim is being negotiated.

International Boundaries

The traditional area of several Canadian aboriginal groups extends across the Canada--United States border. Native Americans sometimes exercise traditional use and occupancy in Canada as well. Now that the Government of Canada is seeking improved relations with the United States, it is appropriate also to begin working towards a co-operative solution to transboundary aboriginal claims.

Claims that overlap the Canada—United States border should be resolved through mechanisms agreed to by the two countries. Canada should begin negotiating a bilateral agreement with the United States that could govern the resolution of such claims, and its approach to these bilateral negotiations should be consistent with its national policy on comprehensive claims.

Where transboundary claims are resolved by agreement, disputes concerning the implementation of such agreements could be resolved by an international arbitration board, consisting of a nominee from each country and a chairman selected by the two nominees. Bilateral mechanisms have been successful in the past in resolving boundary water issues.

SCOPE OF NEGOTIATIONS

The scope of negotiations should include all issues that will help in the achievement of the objectives of the claims policy. Building a new relationship between aboriginal and non-aboriginal societies in Canada will require negotiation of more matters than either cash settlements or exchanges of land.

If the objectives of the new policy are to enable aboriginal communities to develop institutions of self-government, to preserve and enhance their cultures, and to build strong economies in their traditional territory, then the scope of the negotiations must be broadened.

Limitations to the scope of negotiations in the past were, in part, designed to simplify the process. Thus, because the federal government decided that certain subjects were non-negotiable, it felt that discussing them in negotiations would be a waste of time. Because the aboriginal groups judged some items to be integral to their claims, however, they continued to raise them through discussions of other matters in negotiations as well as outside the process. What had been designed to simplify and speed up the process served only to delay and to complicate it.

The claims process would be more efficient if the parties were to discuss the scope of negotiations before proceeding with actual negotiations. Agreement on the aims and objectives and on the scope of negotiations should be outlined in a framework agreement. The framework agreement also should include the timing and funding of the negotiating process, ratification of agreements, interim agreements, and the process for review of agreements. Details on the contents of a framework agreement are discussed in chapter 5.

Many of the subjects included in comprehensive claims negotiations relate to federal government programmes generally available to other aboriginal peoples or to all Canadians. Aboriginal groups should not have to negotiate for the benefits of government programmes or policies that are already available to others. Nor should application of a government policy be suspended by government simply because an aboriginal group is in the middle of land claims negotiations. However, aboriginal groups may choose to discuss these programmes in the claims process, because, unfortunately, claims negotiations often represent the only opportunity for aboriginal communities to discuss services with government officials.

In this section we discuss a number of matters that ought to be included in the scope of negotiations to meet the objectives of the claims process; however, we do not intend that the negotiations should be restricted to these topics. The scope of negotiations should be decided by agreement among the parties in the framework agreement.

Lands and Resources

Canadians are beginning to understand that the relationship of aboriginal peoples to their traditional lands and resources is closely bound up with their sense of self. Their identity is tied inextricably to the land, in contrast to European settlers who have viewed the Canadian landscape as a wilderness to be conquered and harnessed. These profoundly divergent perceptions of the land present a continuing challenge to negotiators.

Not surprisingly, the deepest conflicts between aboriginals and Europeans have been rooted in their different aspirations for the land. Indeed, historically, the European desire to exploit lands and resources inevitably motivated the removal of aboriginal title. This desire remains, as demonstrated by modern treaties, such as those reached for James Bay, the western Arctic, and Alaska. In those areas, settlement agreements were pursued by the dominant society to facilitate major resource projects.

In this policy review of comprehensive claims, we have not tried to address all issues relating to land and resources. Instead, we have emphasized those issues that have proved especially difficult to resolve. Our silence on aboriginal harvesting rights should not be interpreted as an indication that this is a subject of lesser importance. Far from it. The protection of access to wildlife has been one of the most important ingredients of Canadian land claims agreements. We deal only briefly with this matter here because its inclusion in land claims agreements has not been a contentious issue.

Similarly, the mechanism for recognizing aboriginal land ownership through land claims agreements is limited only by the imagination of the negotiating parties. We have made no assumptions

about the availability of aboriginal land-ownership options, but consider it self-evident that a variety of rights in relation to traditional lands will be defined in comprehensive claims agreements.

By focusing upon the land and resources questions that have been the most contentious in recent negotiations and by elaborating upon possible solutions to these difficulties, we suggest, in the following section, ways in which differing interests might be accommodated. Although new problems may emerge from future negotiations, we hope that our ideas about balancing interests concerning the topics discussed here will provide some insights useful for the resolution of land and resource conflicts relating to those matters not discussed.

(a) Management of lands and resources

Land- and resource-use management embraces a broad array of issues relating to wildlife, fisheries, water, and the environment.

Many of the objectives of the claims policy cannot be achieved unless aboriginals play an active role in decisions concerning lands and resources within their traditional areas. Because their culture is deeply rooted in the land, it cannot be protected and enhanced if the land and resources are managed unwisely. Economic opportunities within traditional areas often are quite limited, so the creation of economically viable communities may depend heavily on activities related to land and resources. Moreover, we believe that, as a matter of principle, aboriginal peoples should be able to participate in decisions that affect them.

Although Canadian aboriginal law is still evolving, it is indisputable that the concept of aboriginal title, at the least, embraces the harvesting of fish and wildlife. Thus, to deny aboriginal participation in decisions concerning land- and resource-use management is to deny their involvement in one of the cornerstone elements of their rights. For many reasons, their participation in such matters can benefit Canada as a whole. Aboriginal peoples who maintain close contact with the land possess both knowledge and experience useful in land-use management. Because they are the principal users of renewable resources in many areas, they have the most to gain from conservation and the most to lose through mismanagement.

Furthermore, compliance with any regulatory regime is likely to be greater when the people most directly affected have a significant role in establishing the regulations. In many remote areas, fishery and wildlife management would be more expensive (and perhaps even impossible) without aboriginal involvement and co-operation.

Most aboriginal people appreciate that the rights of non-aboriginal users must be respected and that the responsibility for wise use and management needs to be shared. Land and resources form

part of an ecosystem that can extend far beyond the boundaries of one traditional aboriginal area. Governments have an overriding obligation to protect the rights of all users and to manage resources within their particular jurisdictions. Thus, governments cannot abdicate their functions through a wholesale delegation of decision-making powers; however, there are many examples in Canada of the delegation of significant authority to specialized boards. The decisions of such boards and tribunals are subject to a variety of upper-level controls. In some cases, such decisions are implemented only following ministerial or Cabinet approval. Under other arrangements, there is only a negative veto so that board decisions are final unless overturned following a successful appeal to a minister or to the Cabinet. Sometimes, decisions can be altered or reversed only if reasons are given by a superior body, such as a minister or the Cabinet.

Whatever the review mechanism, there are many methods of delegating decision-making powers without violating the principles of responsible government. We believe that such mechanisms should be a matter for negotiation. Regional differences suggest that mechanisms appropriate for one part of Canada may not work well somewhere else. The diversity of users and governments, mobility of the resource, and interests of the broader community are all factors that need to be considered in the design of bodies that will make land- and resource-use and management decisions.

Aboriginal groups should be entitled to negotiate decision-making participation in the management and use of land and resources within their traditional areas. The decision-making structures in which they participate should have responsibilities that go beyond a merely advisory role. It is vital that aboriginal groups be able to negotiate decision-making powers and to explore with governments the most appropriate means of sharing responsibility for the use and management of land and resources.

The development of integrated and workable management regimes in claims negotiations will involve departments such as Fisheries and Oceans, Environment, and Indian Affairs and Northern Development. To expedite negotiations, these departments must accord claims a high priority and must adjust their policies and programmes to reflect the new policy direction adopted by the federal government as a whole.

(b) Inland waters

Inland waters not only provide transportation, a source of food, and economic opportunities associated with harvesting activities and tourism, but also often have deep cultural significance.

In view of these cultural and economic factors, it is quite likely that aboriginal groups will wish to retain title to some lands that border inland waters. As part of their proposals, they may wish

to ensure that they can control access to such lakes and rivers. Riparian owners (those whose land borders upon water) usually are empowered to restrict access to those waters only by virtue of the law of trespass. If there is point of access other than across the riparian owner's land (for example, public lands adjacent to upstream waters), however, others are free to use the waters. From a practical standpoint, riparian owners control access by land to waters entirely surrounded by their properties.

In some remote areas, and especially in the North, float planes are commonly used to transport recreational users onto lakes. Even if all the surrounding land belonged to an aboriginal group, riparian law alone would not entitle the aboriginals to restrict access to the lake from the air. Prohibiting them from raising the issue of access during negotiations would prevent them from realizing some of the economic and cultural objectives that underlie their wish to retain the lands and waters.

Aboriginal groups should be allowed to negotiate the control of access to waters located on land they retain pursuant to land claims agreements.

By virtue of its very nature, water must remain a common resource. Management of it must take into account the needs of all users. Water management is particularly important to aboriginal users because major changes in watersheds, such as hydro-electric diversion projects, would significantly affect the renewable resource economy. Aboriginal groups should be given the chance to participate in management decisions relating to water within their traditional lands, according to the policy for management boards set out earlier.

(c) Subsurface resources

Negotiating groups seek recognition of their ownership of subsurface resources in many ways and for many reasons. Some seek a generalized right of ownership for subsurface resources throughout the claim area, which, in part, reflects their wish to have an affirmation, rather than an extinguishment, of their rights. It is also consistent with the broad view they take as to the nature of their rights. This approach prevents negotiating groups from having to select lands with unknown mineral potential, and enables the benefits of subsurface development to be shared with members of the group throughout the area. Other groups seek subsurface ownership over more limited areas, for reasons of economic development and also for the protection of special wildlife habitats.

It may be asserted that aboriginal ownership of mineral resources adds a new element to the concept of aboriginal title. In fact, this view may not be accurate. For example, the Robinson—Huron

and Robinson—Superior treaties of 1850 recognized the aboriginal ownership of "any mineral or other valuable productions" on unceded aboriginal lands (Canada 1905, p. 147).

On many existing Indian reserves, mineral rights are held by the Crown for the benefit of the reserve residents. Meanwhile, as discussed earlier, judicial definitions of aboriginal title are still evolving and, thus, our understanding of the content of aboriginal title is far from complete.

Moreover, in chapter 5 we advance reasons why the government should avoid a narrow view of the legal backdrop in approaching the resolution of comprehensive claims. Instead, attention should be directed to achieving the aims of the proposed claims policy. Although aboriginal proposals regarding mineral interests may differ, aboriginal ownership of such resources is consistent with several of the objectives of the proposed claims policy.

Ownership of subsurface resources may help aboriginal societies to become economically self-sufficient. If the suggested policy is followed, such ownership could contribute to a framework of certainty and predictability about land and resources, and, at the same time, could accommodate the interests of both aboriginals and other Canadians. To the extent that aboriginal ownership promotes the protection of important wildlife harvesting areas, it can provide a means of preserving and enhancing the cultural and social well-being of aboriginal societies and can increase effective participation by aboriginal peoples in decisions that affect them.

Perhaps a more open approach by the federal government to the issue of subsurface resources would help to expedite the claims process. Past experience suggests that the government's reluctance to explore various subsurface options has only stalled progress in negotiations. In addition, the recognition of subsurface resource ownership by aboriginal groups may permit a reduction in the size of the cash component in claims agreements. This approach may also encourage aboriginals to view development alternatives more favourably, which is not to suggest that the policy should be designed to make aboriginal communities more in favour of development. Rather, the communities should have the option to participate in benefits as well as in the costs of mineral development if they so choose.

In responding to aboriginal proposals about subsurface ownership, however, federal government policy should accommodate the legitimate concerns of third parties that may wish to acquire exploration or development rights. Any new system of ownership must enable third parties to acquire rights through a system that has clear, certain, and expeditious procedures. The regulatory burden upon industry should not be unduly increased. For this reason, we suggest that a single-window approach to rights acquisition should be favoured. Such an approach would prevent developers from having to deal with a myriad of individual parties to procure their rights. Any system put into place as a result of aboriginal—government

negotiations must enable parties seeking mineral rights to predict accurately the cost of the rights they wish to obtain. It is also desirable for mechanisms to be developed to enable the resolution of disputes between aboriginal owners and developers. Such processes must be clear, certain, and expeditious. We are confident that both government and aboriginal groups can find creative means of meeting all of these concerns.

Moreover, proposals regarding ownership of subsurface resources by aboriginals must recognize the Government of Canada's responsibility to protect the national interest. Forms of such protection may vary, depending upon the national interest at stake. Examples of the national interest include the need for access to minerals that are essential for Canada's self-sufficiency of energy supply. Additionally, Canada may need the power to create transportation or supply corridors in certain circumstances. Recent federal--provincial agreements with Newfoundland and Nova Scotia contain mechanisms for protecting the national interest in hydrocarbon resources, yet give the provinces substantial power over how, when, and by whom such resources may be exploited. Arrangements with aboriginal societies could contain similar safeguards.

Within areas of federal jurisdiction, the claims policy should permit negotiations to include discussions of aboriginal ownership of subsurface resources. Such ownership may take a variety of forms and may be for a variety of purposes.

However, third parties that wish to acquire rights to explore for, or develop, subsurface resources must be able to do so within a system that is certain, clear, and expeditious, and that enables them to predict accurately the cost of the rights they seek. A single-window approach to the acquisition of mineral rights by third parties should be favoured. Certain, clear, and expeditious mechanisms for the resolution of disputes between aboriginal communities and mineral explorers and developers should be formulated. The federal government must retain the power to protect the national interest concerning matters such as essential subsurface resources, supply corridors, and transportation routes.

(d) Offshore and sea claims

Many aboriginal groups have relied more heavily upon the ocean than the land. In British Columbia, coastal tribes have depended on the sea for food and transportation. Their spiritual legends are replete with references to the sea; their economy is based upon salmon, oysters, kelp, and the many resources of the sea. Inuit of the Northwest Territories, Quebec, and Labrador are equally dependent upon the sea's resources, including seals and arctic char. For most of the year, they regard the land-fast ice in the Arctic more as land than as water.

Governments treat land and sea differently. Although sovereignty is exercised over both, the rights exercised by governments and private citizens are more limited offshore than on land. Non-aboriginals' concept of the ocean is not unlike that concept of land held by many aboriginal people, in which the ocean is a resource to be shared, rather than property to be divided up and owned by corporate or private individuals.

Notwithstanding the complexity of jurisdiction over oceans in comparison to land, claims agreements should include provisions for the offshore and its resources. Because ocean resources play such an important role in many aboriginal cultures and economies, the offshore should be included in negotiations. No judicial decisions have been handed down concerning aboriginal rights in offshore areas. So, as the concept of aboriginal rights is still evolving and while that process continues, the federal government should approach negotiations with an expansive, rather than a restrictive, view of the law.

Offshore negotiations proceeded with the Province of Newfoundland and Labrador notwithstanding the existence of a decision of the Supreme Court of Canada establishing federal authority over the continental shelf. Yet the Government of Canada went beyond this legal decision and agreed to share with Newfoundland the management of, and benefits from, offshore oil and gas. The government also should negotiate the offshore claims of aboriginal groups. To do otherwise would be to undermine negotiation and to invite litigation.

Recognizing the natural and legal differences between land and sea, topics for negotiation could include access to wildlife and fishery resources, participation in decision making for conservation and resource allocation, and a sharing of the benefits from sub-sea minerals and hydrocarbons. The sharing of benefits from non-renewable offshore resources will have to be discussed in light of proposals regarding onshore resources. Like developers of onshore resources, potential offshore developers must be protected through rights-granting and dispute-resolution mechanisms that are clear, certain, and expeditious. Canada also must be able to protect the national interest offshore, which may be larger than that on land as a result of international, environmental, and defence considerations.

For a number of years Canada has been concerned about possible challenges to its sovereignty in the waters of the Arctic archipelago. The voyage of the American icebreaker Polar Sea last summer drew attention to the issue once again. Thirty years ago the federal government strengthened Canadian sovereignty by moving several hundred Inuit from northern Quebec to Ellesmere and Cornwallis islands in the high Arctic, where they established the communities of Grise Fiord and Resolute. Acceptance by Canada of the Inuit claim to the boundaries of the land-fast sea ice could strengthen Canada's claim to historical use and occupancy of arctic waters. Today, a role for Inuit in strengthening Canadian sovereignty would have their full support.

The settlement of offshore claims will be an important component in building self-sufficient economies for many aboriginal groups, which is a central objective of this policy. Aboriginal peoples who rely heavily upon the sea's renewable resources should be permitted to put their arguments for broader participation in offshore matters before the federal government.

The federal government should be prepared to negotiate claims based upon traditional use of the ocean resources. Negotiations relating to the offshore must respect the existence of provincial jurisdiction over certain areas, and Canada's international obligations. However, in areas where aboriginal peoples' traditional territory and resource use have extended to the offshore, negotiations should proceed, to the extent possible, as though the claims involved land.

(e) Third-party interests

One of the modern-day realities about land claims is the existence of third-party interests within the claimed area, which may include individual ownership of parcels of land, oil and gas exploration rights, mineral rights, fishing licences, timber rights, and trap lines. Whatever the nature of the interest, the result is the encroachment by third parties and the acquisition of a right and an interest on what was once the domain of the aboriginal group.

The establishment and existence of conflicting interests over portions of the same area has largely resulted from circumstances beyond the immediate control of the aboriginal group and the third-party. Generally, it has resulted from the activities of government in granting and permitting third-party rights without having previously dealt with the aboriginal interest over the area.

Any holders of a third-party interest will be concerned when an aboriginal group submits a land claim that affects that interest. Aboriginal people know from experience what it means to have rights taken away without consultation or compensation, and many understand the necessity of ensuring that the agreements they sign protect the interest of third parties. The interest holders will, of course, turn to the government for an understanding of what is at stake in this process and to ensure that the government is looking out for their interests. In the negotiation process, the federal government is responsible for representing and safeguarding the interests not only of third parties but also of all other Canadians. It is incumbent on the government to minimize economic dislocation of third parties in the area and to minimize acrimony between the aboriginal group and third parties. Thus, third-party interests must be respected in the negotiations.

Nevertheless, in certain cases the third-party interest may have to be interfered with for the resolution of the claim. Thus, when meaningful land and resource selection for an aboriginal community is precluded by third-party interests or when an aboriginal group wishes to maintain or re-establish its territorial integrity, then the group's original occupation should be respected.

In deciding whether or not the third-party interest should be pre-empted, it will be necessary to determine the balance of interests. No party should have an automatic right of pre-emption. Rather, consideration must be given to matters such as the extent of economic dislocation, the cost of compensating the third-party interest, the achievement of the aims and objectives of the claims policy, and so on.

When it is necessary to interfere with the third-party interest, the federal government should attempt first to acquire the interest with the consent of the third party. Another alternative would be a future reversion of the interest to the aboriginal group, for example, when a licence or permit has expired. Only as a last resort should expropriation be considered.

We believe that direct representation of third-party interests in negotiations would be impractical, because, undoubtedly, the negotiations would become more complex and lengthier. Issues such as representativeness could further complicate and delay negotiations. Even though the federal government will continue to be ultimately responsible for balancing non-aboriginal with aboriginal interests during negotiations, we recommend that specific consultations and briefings be held with third parties that might be adversely affected to ensure greater awareness among third-party interests and greater consideration of their concerns. Moreover, third parties also should benefit from the public education programmes we recommend in chapter 5.

The existing rights of third parties on traditional aboriginal lands should be respected. Third-party rights may be affected only in certain cases. In all cases, such rights should be dealt with equitably.

The federal government, in conjunction with the aboriginal party, should confidentially brief, and consult with, the holders of third-party interests who might be adversely affected by negotiations.

(f) Protecting aboriginal interests before settlement

There is frequent disagreement between aboriginal groups and the federal government as to whether development projects should be authorized and other land alienations should be made after a claim has been accepted and before it has been settled through negotiation.

For example, for more than a decade many aboriginal groups north of 60° have advocated a moratorium on development pending the resolution of claims. Although moratoriums have been imposed in specific places, the government has always refused to order a general moratorium.

We agree that a general moratorium could create economic dislocation that would lead to hardship, some of which would undoubtedly be suffered by aboriginal communities, in which individuals and local businesses would experience significant loss.

On the other hand, the current situation is unfair to aboriginal groups. Although the federal government has agreed to negotiate claims relating to vast areas, it continues to behave as though claims did not exist. Land is alienated, projects are authorized, and management decisions are made with little (if any) regard to the claim. For the government, business proceeds much as usual. Because the functions of government are unimpaired by the claim, government feels no pressure to move negotiations forward.

Aboriginals, meanwhile, see their claim area being subjected to more and more third-party interests. Their options disappear before their eyes. Their only method of encouraging the federal government to take their claim seriously is through litigation. Given the time, cost, and uncertainty of litigation, aboriginal groups will resort to it only in the most extreme circumstances. Yet, those whose claims have been accepted, but who have little prospect of getting to the negotiation table for many years, may be driven to pursue litigation to protect their land from further encroachment.

Negotiation is the preferable route, so steps should be taken to enhance the likelihood of its success. The policy we propose would accomplish three objectives. First, it would increase the pressure on government to negotiate expeditiously and in good faith, thereby helping to equalize the bargaining power between the two sides. Secondly, it would give aboriginals an opportunity to play a role in decisions affecting the claim area before the claim has been settled. Thirdly, groups awaiting their turn at the negotiation table would less likely feel compelled to litigate to protect the status quo.

North of 60°, aboriginal groups already are actively involved in negotiation, and because the lands and resources in the North are subject to federal jurisdiction, we recommend an approach there that differs from the one that should be taken south of 60°.

While negotiations are proceeding, aboriginal groups north of 60° should be entitled to participate in decisions concerning activities or alienations in relation to the claimed area that could derogate from their claims. The means of such participation should be one of the first items negotiated in their claims.

Although we recommend no particular mechanism, we believe that the method of participation should be as simple and as expeditious as possible, that it should not be intended to replace more elaborate land-use planning structures that may exist or come into being later, and that it should ensure the protection of the aboriginal interest.

Along with aboriginal participation in decision making, we recommend consideration of the establishment of an Aboriginal Heritage Fund. Revenues from developments that go forward prior to the resolution of a claim could be channelled into such a fund, to be shared when details of the claim agreement have been worked out.

The establishment of these mechanisms for participation would give aboriginal peoples a real say in what happens in the claimed area. It also may prevent them from having to participate in other regulatory discussions (such as the National Energy Board and the Environmental Assessment Review Process) to protect their interest. Rather than spending valuable time and resources appearing before such bodies, they would be free to focus their attention upon the negotiations.

In the South, the federal government is much less able to control activities within the area of a claim, except on pockets of federal land. The government should not authorize activities in these areas without the consent of the aboriginal group, unless it is essential to do so in the national interest. The minister responsible for any government department that intends to undertake activities that could prejudice the aboriginal interest in a claim area should be required to notify the minister of Indian Affairs and Northern Development before proceeding. The Department of Indian Affairs and Northern Development should take a leading role in communicating the proposed plans to the affected aboriginal group. If an appropriate course of action cannot be agreed upon between the two ministers, the matter should be referred to the Cabinet for a decision.

In areas of federal jurisdiction south of 60° for which a comprehensive claim has been accepted, the federal government should refrain from authorizing activities or land alienations that could derogate from the aboriginal rights asserted, unless such activities or alienations either have been consented to by the affected aboriginal group or are essential to the national interest.

Although recognizing that the federal government has a relatively limited ability to prevent alienations south of 60°, we believe that it should actively encourage the development of some mechanism to deal with the problem, in keeping with its responsibilities under section 91(24) of the Constitution Act. Recent events in British Columbia involving the conflict between forestry development and the assertion of aboriginal title by the Haida demonstrate that the costs of court actions and social unrest associated with ignoring the issue are very high.

Although many aboriginal groups have urged us to recommend the imposition of a general moratorium on development in claims areas, we do not believe that such an approach would be in the national interest. Our recommendations are intended to balance the public interest with that of aboriginal groups, by ensuring that they have a chance to participate in decisions about their land before their claim has been settled.

Building Self-sufficiency

Prior to contact with Europeans, aboriginal societies had self-sufficient economies based primarily on harvesting the renewable resources. They also made use of non-renewable resources and traded with other aboriginal groups and later with Europeans. Settlement and development by the European newcomers disturbed the traditional aboriginal economies. Treaties recognized the economic interests of aboriginal peoples by guaranteeing hunting and fishing rights on unoccupied lands. Neither the federal government nor the aboriginal parties to historical agreements could foresee either the extent of eventual occupation by non-aboriginals or the devastating effect it would have on traditional economies.

Modern claims agreements must help to restore and develop economically viable aboriginal communities. The agreements must be flexible enough to accommodate changes in the opportunities for economic development. To insist that aboriginal peoples rely solely on traditional activities would be to compound the errors of the past and to condemn aboriginals to a marginal economic existence.

At the same time, the renewable resource economy must be sustained and supported so that the option of developing traditional means of livelihood is always available. Economic development provisions respecting renewable resources could take many forms, such as support for marketing products of renewable resource harvesting and income support for aboriginal hunting, trapping, and fishing.

The social, cultural, and political health of aboriginal societies depends upon on a solid economic foundation, and aboriginal peoples should determine for themselves how their economic needs can be met. Agreements must provide for a range of economic development options if they are to achieve their objectives.

(a) Resource revenue sharing

Economic participation by aboriginals in resource development could take a variety of forms. As discussed earlier, such participation may result from aboriginal ownership of subsurface resources in certain areas. Even where aboriginals do not own the resources, however,

there are other mechanisms that could facilitate their participation in the economic benefits of resource development. Such mechanisms could include a share of royalties derived through the Crown, and a share of other revenue sources such as licence, bidding, and annual fees.

In the current economic climate, the public purse has a limited capacity to provide cash for aboriginal groups. The sharing of resource revenues would permit the cost of claims agreements to be spread over time, and would coincide with the objectives of many aboriginal groups that do not seek large amounts of cash by way of compensation for rights lost or surrendered. In fact, most groups reject a cash approach because it typifies a land-transaction view of their claims. Moreover, many groups feel, with considerable justification, that no amount of money, however large, could compensate them for past or future losses of their aboriginal title. They seek a method of sharing the benefits of resources from the lands they have used and occupied, so that their communities may experience economic well-being at a level comparable to that of other Canadian communities. As we indicated earlier, the economic well-being of aboriginal societies should be one of the objectives of the comprehensive claims policy.

Aboriginal communities now receive external funding through a myriad of federal programmes, which exacerbates their feelings of dependency and powerlessness. Participation by aboriginal societies in the continuing benefits of resource development could help both to reduce the need for federal transfer payments, and to establish within the communities a sense of economic independence.

We are not suggesting that there would be no need for a cash component in agreements if revenue sharing options were included in claims negotiations. There may be some areas where the prospects for resource development are long term, whereas the need for funding for economic development is immediate. In such situations, one approach may be to provide immediate funding as an advance against resource revenue shares that would accrue in the future. It must be stressed, however, that advances against future resource revenues are not intended to be a substitute for the economic and community development moneys discussed in the next section.

One question that arises is whether the claims policy should require a ceiling on the amount of money an aboriginal group may acquire through revenue sharing. No ceiling has been placed upon the amount of resource revenue made available to the Province of Newfoundland following The Atlantic Accord, an underlying objective of which is that offshore resource development should help to fuel the provincial economy, which has suffered historically from relatively high unemployment and low per-capita income (Canada—Newfoundland

1985). On a national scale, aboriginal communities suffer from higher levels of unemployment and lower per-capita income than the Province of Newfoundland. If the achievement of a sound economy in Newfoundland is a legitimate goal of national policy, should a similar achievement within aboriginal societies be any less so?

There are other arguments against the notion of ceilings on the aboriginal share of resource revenues. Generally, the resources to be developed will be non-renewable (such as minerals), renewable only over long periods (such as forests), or difficult to return to original uses once they have been committed to a particular project (such as water for hydro-electric purposes). Thus, participation in the benefits of such developments provides a once-only opportunity for aboriginal communities. These same communities are likely to bear much of the social and environmental cost of resource development, and should be able to draw upon the economic benefits to offset other losses. If resource revenue sharing creates wealth within aboriginal communities, the nation as a whole will share in such wealth through taxation, economic spin-offs, and reduced transfer payments.

The federal government has resisted the inclusion of resource revenue sharing in negotiations, insisting that the costs of an agreement must be known in advance. Because we believe that it is unwise to aim at once-and-for-all settlements, we do not believe this to be a valid objection to resource revenue sharing as part of an agreement.

Generally, an open approach to resource revenue sharing should help to reduce the size of cash components in claims agreements. Over time, it also should have a positive effect upon the federal economy. This is not to say that aboriginal societies should be the sole beneficiaries of all resource development within their claims areas. Both because of the services it provides and because of the costs it bears in encouraging such development, the nation as a whole is entitled to some of the benefits of resource development. Moreover, it must be recognized that, as they take on increasing responsibilities, the territorial governments also will require access to resource revenues. Thus, where territorial governments are involved, the overall approach to revenues from resource development should be one of sharing between aboriginal groups and the federal and territorial governments. It also may be that, in relation to some projects, the available economic rent will be marginal. In such cases, the affected governments and aboriginal groups may be forced to choose between not having a particular project and there being little or no resource revenue to share.

When provincial governments participate in claims negotiations, they should be encouraged to adopt a similarly open approach to negotiations concerning resource revenue sharing.

Finally, it should be observed that where several aboriginal groups reside in the same jurisdiction, each may present a different proposal for resource revenue sharing. Yet there may be circumstances in which the development of certain resources would be inordinately complex unless identical resources were subject to the same revenue sharing scheme throughout the entire jurisdiction. In such cases, aboriginal groups should be encouraged to co-ordinate their proposals.

Within areas of federal jurisdiction, the claims policy should permit negotiations to explore means of enabling aboriginal groups to share in the revenues from resource development in their traditional areas. Mechanisms for revenue sharing must recognize that the nation as a whole is entitled to a financial return from resource development. Negotiations should take into account the future devolution of responsibilities to the territorial governments and the fact that such governments will require funds with which to carry out their responsibilities to the public.

(b) Monetary compensation

What is the aboriginal title to the traditional lands of the Nishga in British Columbia or the Inuit of Labrador worth today? What was it worth when the land was first occupied by non-aboriginals? What is the value of use of the land in the intervening years? What is the value of its future use? These questions point out the absurdity of working out a formula for compensation.

Many aboriginal groups recognize this difficulty. They also believe that money could not possibly compensate them fully for their traditional lands. Thus, they recommend that any direct land claims payments should be geared to the building of self-sufficient communities.

The federal government should drop the concept of a cash-for-land transaction or compensation for past or future use of the land. In addition to providing opportunities for economic growth, the financial contribution could be understood as a tangible symbol of Canada's willingness to build a new relationship with aboriginal peoples.

Agreements also may contain other provisions---such as resource revenue sharing---that would assist in building self-sufficient communities. These other provisions may be of greater significance in the long term, but the short-term need for development capital should not be overlooked if aboriginal communities are to be able to participate in developments now occurring in their regions.

How will the federal government determine the appropriate level of financial contribution? The primary consideration should be a level of capitalization that would give the aboriginal group the potential to develop its economic future on its own terms. Each group may present a different case. The resources of its traditional lands,

and the other elements of its agreement, will no doubt lead to very different formulations of capital required and the system to be used for delivery of the funds to aboriginal enterprises. For these reasons, the monetary provisions across the country will be neither comparable nor identical. A standard formula would ignore regional and local differences, and should not be applied.

The amount of capital to be made available will be dependent upon other variables in the agreement such as land management regimes, self-government, and resource revenue sharing. If aboriginal groups were given greater control over the land and resources, then a smaller direct financial contribution would be required. Resource revenue sharing agreements also would limit the requirements for capital in the future because aboriginal groups would be able to share in the benefits from new development.

Because the funding is aimed at economic development it should go not to individuals, but to an organization free to make its own decisions, and accountable to its owners rather than to government. In keeping with the principle of promoting economic development, undeveloped land and capital transfers from the claims process should be tax-exempt.

The funds should not necessarily be delivered in one lump-sum payment; the aboriginal group may want them spread out over a number of years. For its own financial planning, the federal government also may want to deliver the funds over several years.

The federal government also should consider interim agreements that would deliver a portion of the development capital to the aboriginal group in advance of a complete agreement. This instalment would demonstrate the good faith of the government and would enable the aboriginal group to develop its economic future. Because the amount of capitalization required may vary depending upon other aspects of the agreement, the financial agreement should be one of the last items negotiated before a complete agreement.

Once a complete agreement is signed, the amount of capitalization will be fixed. No doubt some of the aboriginal groups will succeed in their investment of capital and some will fail. Those who invest funds locally will be investing in regions of the country where few non-aboriginals are prepared to do so because of the limited economic opportunities and the boom—bust pattern of local resource-based economies. On the other hand, the ability to alter the capitalization agreement whenever there is a failure could serve to maintain a sense of dependency upon the federal purse.

However, government economic development programmes should include aboriginal development corporations. External events, such as a decision by other nations to ban the import of furs or a major

environmental disaster, could have a devastating effect on the economy of aboriginal communities. They should not be excluded from government programmes or bail-outs in extraordinary circumstances simply because they are aboriginal.

In studying the question of monetary compensation we have considered the current financial health of the Government of Canada. There is no question that the accounts of the government will determine the amount of the federal contribution. Some might argue that the aboriginal groups should not be penalized financially for the fiscal mismanagement of others. Although that argument has some merit, it ignores the reality that funds for all governments are severely strained. We also are convinced that we must abandon the notion that large quantities of cash will meet the needs of aboriginal peoples. Cash was not the answer 100 years ago, and it is not the answer today. Far more important in contributing to lasting benefits are the establishment of political institutions, access to resources, and the sharing of future revenues from the land.

Most of the regions of the country where claims remain to be settled are underdeveloped, and the injection of capital would benefit the regional economies. Money for aboriginal economic development would help in the long term to develop these regions. Also, as aboriginal economies grow, government expenditures on social programmes should decrease.

A central objective of the proposed comprehensive claims policy is to build better relationships between aboriginal societies and Canada. One of the major building blocks will be economic development to enable aboriginal societies to cast off their dependency on government welfare and hand-outs. This development could take many forms based either on support for traditional harvesting of renewable resources, or on the use of other resources in new enterprises. These choices, and the opportunity to succeed or to fail, must be those of the aboriginal group, not of the government.

We cannot compensate fully for the past use and occupation of traditional aboriginal territories, but we must look ahead to the prospects of tomorrow. Aboriginal peoples must have an opportunity to share in the economic benefits of the future.

Agreements should include the provision of capital to aboriginal groups for economic and community development. The amounts may vary from region to region, depending upon what is required to build self-sufficient economies. Aboriginal groups should be able to use the funds as they see fit for the purpose of economic and community development. Such funds should be held not by individuals but by organizations responsible to the aboriginal group. Some funds may be delivered in advance, but the full allocation should await a complete agreement. The total amount should be fixed in the complete agreement.

(c) Training

Many aboriginal groups emphasized to us the urgent need for training programmes to prepare them for the responsibilities and opportunities that a comprehensive agreement would bring. At present, aboriginal communities that wish to undertake new business ventures often must turn to people from outside their communities both for expert advice and for the management and administrative skills necessary for success in business.

Education and training should not be withheld until the completion of negotiations, as it will take considerable time to develop the necessary skills. Resources should be made available now so that when agreements are signed aboriginal communities will have the skills required to administer and implement agreements themselves.

Government programmes should be available to aboriginal communities to train their people for the business, administrative, and management skills that will be required for the implementation of claims agreements and the building of economically viable communities.

Political, Social, and Cultural Matters

Aboriginal peoples in Canada have rich cultural traditions based on varied and complex social and political systems. However, European colonization and settlement severely undermined the integrity and stability of their societies.

The colonial ideology was founded on a notion of the superiority of European values, and provided no opportunity for the recognition of the collective rights of aboriginal peoples. Instead, the ideology called for the protection of aboriginal peoples until they could be "civilized" and assimilated into the mainstream.

A claims policy based on the affirmation of the special rights of aboriginal peoples rather than on assimilation must respect the unique cultural values and traditions of aboriginal societies. It also must provide for the future social well-being of aboriginal communities and the development of self-governing institutions. Only then can the policy result in lasting agreements that define a new relationship between aboriginal peoples and governments in Canada.

Consistent with the objectives of the proposed comprehensive claims policy, the scope of negotiations should include political, social, and cultural matters. Aboriginal peoples should exercise the greatest possible control over matters that directly affect the preservation and enhancement of their culture. They also should be able to negotiate provisions to ensure the social well-being of their communities.

The claims process should provide an opportunity for aboriginal peoples to create their own political institutions in negotiations with representatives of the appropriate governments. In principle, aboriginal peoples should be free to determine the form of government best suited to them; however, discussions between governments and the aboriginal peoples will be necessary to determine how the structure of aboriginal self-government would relate to the larger Canadian political system.

The federal government should negotiate self-government in the claims process on lands over which it currently has exclusive jurisdiction. When provincial lands and legislative responsibilities are involved, the provincial government must be included in discussions to determine what jurisdiction aboriginal governments would exercise and the relationship between aboriginal and provincial institutions.

Future claims agreements will define a new relationship between the governments and the aboriginal peoples affected, based on the recognition and affirmation of their unique rights. In addition to providing a framework of certainty for land and resources and an opportunity for economic self-sufficiency, agreements also must include provisions that address the social and cultural needs of aboriginal societies.

Thus, agreements could include cultural provisions concerning archaeological activity on traditional lands, the return of cultural artifacts, support for culturally relevant education, the use and teaching of aboriginal languages, and aboriginal communications. To meet social objectives, provisions also could include school boards, administration of justice, health facilities, and social services.

Political matters related to the structures and powers of institutions of self-government are integral to the achievement of all of the objectives of the claims process. Aboriginal peoples themselves are in the best position to determine how their economic, social, and cultural interests should be furthered.

Governments should come to the negotiations with a commitment to share a range of powers with the aboriginal peoples. If governments were to take a more open approach to sharing power, negotiations would be more expeditious and would result in a more rational implementation of the agreement. Excluding political matters from the claims process has led to a situation in which aboriginal groups have had to negotiate with a number of bureaucracies to obtain limited advisory and administrative powers. The resulting system may make sense when viewed in terms of a decentralized bureaucracy, but it is inappropriate to the needs of the aboriginal communities. Self-government institutions designed by aboriginal peoples should formulate policies, establish priorities, and develop long-term plans according to their own interests and aspirations. Flexibility in social, political, and cultural matters is essential so that programmes, administration, and structures can be adjusted in accordance with the evolution of aboriginal societies.

Process of Negotiation and Implementation of Agreements

PUBLIC ARCHIVES CANADA/C-68920

Signing Treaty No. 9 at Windigo, Ontario, July 18, 1930

CHAPTER 5 PROCESS OF NEGOTIATION AND IMPLEMENTATION OF AGREEMENTS

PRINCIPLES

It was beyond our terms of reference to consider any method other than negotiation for resolving aboriginal claims. We have no doubt that negotiation is the best way of settling issues concerning unextinguished aboriginal rights; however, unless a more effective negotiating policy is adopted, aboriginal groups may have no alternative but to resort to litigation.

Negotiations are preferred for several reasons. First, they are far more likely to produce solutions that accommodate the interests of both aboriginals and governments. In dealing with comprehensive claims, there is no room for absolute winners and absolute losers. Litigation promotes zero-sum, winner-take-all outcomes. The accommodation of interests and consensus, which are crucial ingredients of satisfactory claims settlements, will not likely be obtained through litigation.

Secondly, negotiation can be truly comprehensive, whereas litigation cannot be. Many of the issues that should be addressed in settling claims go far beyond the legal issues that can be decided in court. Claims agreements can be forward-looking, whereas litigation focuses on compensation for damage done in the past. The future economic needs of the aboriginal community and the design of appropriate management and political institutions can be addressed carefully by the participants in claims negotiations. Litigation provides a poor forum in which to work out good solutions to these problems.

Thirdly, litigation fosters adversarial attitudes that undermine the prospects of developing a true "social contract" between Canada's aboriginal and non-aboriginal communities.

The superiority of negotiation over litigation is a crucial reason for adopting a more effective comprehensive claims policy, but, unless negotiations deal more expeditiously with aboriginal claims and the interests of aboriginal groups are protected pending the outcome of negotiations, groups may turn to litigation as the only effective means of securing their rights.

A comprehensive claims policy that results in some groups having little prospect of negotiating their claims for many years will appear to those groups to be an impractical alternative to litigation. This situation is particularly likely to occur when land alienation and resource developments are proceeding regardless of aboriginal rights. Therefore, a new policy for negotiating comprehensive claims must aim at resolving claims within a reasonable time and should protect aboriginal interests while negotiations are pending.

Given the legal and constitutional developments described earlier, it is appropriate for the federal government to approach comprehensive claims negotiations with a general acknowledgement, rather than with a denial, of the existence of aboriginal rights. Such an acknowledgement may improve the climate for negotiations. Many aboriginal groups have been puzzled by previous governments' preparedness to negotiate claims yet unwillingness to admit that rights were at issue. Government's refusal to acknowledge the existence of aboriginal rights also has been perceived as an assertion by government of its power to determine both the pace and the scope of negotiations. This position has engendered a mistrust of the government among negotiating groups and a cynicism about its commitment to the negotiating process. Moreover, a refusal to acknowledge that rights are at issue denies both legal and constitutional reality.

The general acknowledgement we advocate would not require the federal government to admit liability in regard to every claim. If individual negotiations are unsuccessful, it is possible that litigation will ensue. No potential litigants wish to admit their liability in a manner that could be used to their detriment in subsequent judicial proceedings. However, the general acknowledgement of aboriginal rights proposed here should not preclude the Crown from disputing the existence or content of aboriginal rights in any specific case that is later litigated.

The federal government should acknowledge that the legal and constitutional recognition of aboriginal rights in Canada provides the foundation for comprehensive claims negotiations.

Although aboriginal legal theory has grown over the past century, its evolution into clear rules and principles of Canadian law has been slow. As a result, many legal questions are unresolved and may remain so for several decades. When there is legal controversy, we believe that the federal government should approach negotiations with a generous, rather than a narrow, interpretation of the law. This approach would be in keeping with the government's fiduciary

obligations, outlined by the Supreme Court of Canada in the Guerin case, and would be consistent with the government's constitutional powers under section 91(24) of the Constitution Act, as well as the constitutional entrenchment of aboriginal rights in 1982. In addition, it would be in step with the view expressed by the Supreme Court of Canada in the recent Simon case. After reviewing Judge Patterson's language in the Syliboy case, in which he referred to the Indians as "uncivilized people or savages" lacking capacity to enter into treaty relations, Chief Justice Dickson observed:

> It should be noted that the language used by Patterson J.,... reflects the biases and prejudices of another era in our history. Such language is no longer acceptable in Canadian law and indeed is inconsistent with a growing sensitivity to native rights in Canada. (Emphasis added.)
>
> (Simon v. The Queen 1985, p. 13.)

Legal uncertainty persists over the effects of defences such as limitation periods, laches*, and estoppel** on lawsuits based upon aboriginal title. Such defences are rooted in justifiable policies, for example, the desirability of rights being asserted in a timely fashion and the difficulty of preserving evidence over long periods. These otherwise legitimate objectives have little place in a government policy that encourages negotiation, rather than litigation, of aboriginal claims. It is unfair for the government to invite aboriginal groups to the negotiating table, yet to reserve the right to rely upon defences that operate by virtue of the passage of time. Such a stance cannot help detracting from the atmosphere within which claims negotiations proceed.

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* Laches. An equitable defence doctrine, defined as inexcusable delay in asserting a right, accompanied by some actual or presumable change of circumstances, rendering it inequitable to grant relief (York v. Powell (1909), 10 W.L.R. 407 at 410 (C.A.). (Yogis 1983, p. 121.)

** Estoppel. An impairment whereby a party is precluded in any subsequent proceedings from alleging or proving that certain facts are otherwise than they were originally made to appear (The People's Bank of Halifax v. Richard A. Estey (1904), 34 S.C.R. 429.) (ibid., p. 78.)

To show true commitment to the negotiating process, the federal government should suspend the applicability of such defences in the period following the filing of a comprehensive claim. If the claim is not accepted for negotiation, or if negotiations later break down, the time relevant to the operation of these defences could begin to run again. We believe that such an undertaking by government would demonstrate its genuine belief in the negotiating process, and would contribute to a spirit of trust and co-operation at the negotiation table.

Once a comprehensive claim has been filed, the federal government should undertake not to raise technical legal defences such as limitation periods, laches, and estoppel in litigation between the time of the filing of the claim and either the rejection of that claim or the breakdown of negotiations.

Without exception, an aboriginal party has few resources other than the intelligence, commitment, and skill of its leaders, who must sit across the table from the representatives of the Government of Canada, with their apparently overwhelming resources and power. The government decides which claim is accepted, how much money will be made available to the claimant group for research and negotiation, when negotiations will begin, and the process for negotiations. Except where court action threatens a major development project, the government's patience for negotiation appears unlimited. It is hardly surprising that aboriginal groups have little confidence in the fairness of the process, or in the government's desire for early settlements.

The negotiating process should be fair and should encourage negotiations that progress expeditiously towards agreement.

Complete fairness and balance in the process will never be achievable. However, steps can be taken to increase fairness and to encourage progress in negotiations. As a means of achieving these goals, we suggest a new process.

The process we recommend would commence with the submission of a claim to the land claims programme of the Department of Indian Affairs and Northern Development [formerly the Office of Native Claims], which would be required to respond to the claim in a timely fashion. If the claim were rejected, reasons would have to be given, and an appeal to the minister would be available. Before a claim could be accepted for active negotiation, a framework agreement would be negotiated. The framework agreement would deal with funding of negotiations, the scope of the substantive negotiations, expected timetable, ratification procedures, expectations for interim implementation of sub-agreements, and expectations concerning certainty and flexibility as to various elements of the eventual agreement. The achievement of a framework

agreement would enable the group to move onto the short list for active negotiations. Sub-agreements could be implemented during the course of negotiations and before the signing of a complete agreement. Agreements should provide for arrangements for implementation, periodic review, and methods of resolving disputes.

An integral element of the proposed process would be removal of certain functions from the Department of Indian Affairs and Northern Development. Funding decisions would be made by the Secretary of State. An independent Commissioner for Aboriginal Land Claims Agreements would be appointed to monitor and facilitate the application of the policy, the process, and the implementation of agreements.

These changes are essential to restore the faith of aboriginal groups in the fairness of the process and to increase the timeliness of negotiations.

INDEPENDENT MONITORING OF THE PROCESS

The Department of Indian Affairs and Northern Development, through the land claims programme, is responsible for accepting or rejecting claims and for funding aboriginal groups during negotiations. The minister of this department has overall responsibility for the government's position in negotiations. He also has a fiduciary duty to the aboriginal groups, and, thus, conflicts of interest are inherent in the process.

Moreover, as we have mentioned, the bargaining powers of the two sides are unequal. In the absence of imminent litigation that threatens major development prospects, the patience of the federal government in negotiations can seem limitless, whereas the opposite is usually true for aboriginal groups. For them, the settlement of claims is a major issue that consumes most of their time and energy. Except for grants and loans from the government, their financial resources are practically non-existent. In contrast to labour—management relations, aboriginal groups have little bargaining leverage, and, at best, they can appeal to public sympathy. Their only other tool is to threaten litigation, but, for reasons already given, this option is seldom realistic.

The establishment of an independent and neutral instrument is essential to overcome some of the problems in the present process. Thus, we recommend that the federal government should appoint a Commissioner for Aboriginal Land Claims Agreements to ensure fairness in the process of negotiation and to expedite the settlement of claims.

The commissioner should be appointed by order in council after the minister consults with appropriate aboriginal organizations and the House of Commons Standing Committee on Indian Affairs and Northern Development to ensure that the nominee has their confidence and respect. The commissioner should report to that committee.

Although establishment of the commissioner's office through an Act of Parliament would ensure a degree of permanence and stature that the office would certainly deserve, legislation takes time. Neither the government nor the aboriginal groups should have their time and energy channelled away from the pursuit of current negotiations. Therefore, we favour the establishment of the office by means of an order in council. To ensure the commissioner's independence, this same order in council should establish the office outside the Department of Indian Affairs and Northern Development and place it for administrative purposes under the Privy Council Office. Once the office has been in operation for a short time, the desirability of establishing it through an Act of Parliament should be given serious reconsideration.

The function and duties of the commissioner should be

- to monitor claims negotiations and to report to the standing committee annually as to his activities and the progress of claims negotiations;

- to make recommendations to the standing committee for improving the progress of negotiations;

- at the request of a negotiating party, to examine and facilitate the resolution of any issue of concern in the negotiations;

- at the request of a negotiating party, to provide mediation services;

- at his own initiative, to request an appearance before the standing committee to report on the conduct of a particular negotiation, and to make recommendations relating to progress in the negotiations; and

- to review and report on the implementation of claims agreements.

To carry out these functions and duties, the commissioner should be empowered

- to convene and adjourn meetings with the negotiating parties;

- to ask questions of, and request responses from, negotiating parties, and, in consultation with the party concerned, to set a reasonable time for responses. Parties unable to comply with any such request should be required to provide written reasons to the commissioner and to the other parties to the negotiations;

- following consultation with the negotiating parties, to set deadlines for the completion of any process or stage of the process being examined;

- to make recommendations to negotiating parties as a means of identifying mutually acceptable solutions to contentious issues;

- to provide advice to the government agency responsible for funding decisions; and

- following consultation with the negotiating parties, to recommend that negotiations be temporarily or indefinitely suspended.

The commissioner would be, in effect, a "keeper of the process." This appointment would relieve the department of some of the functions it now fulfils, and would go some distance towards making the process fairer, more expeditious, and more open to public scrutiny.

In the position as an overseer of the process, the commissioner would be especially qualified to identify weaknesses and problems in the policy and in its application. Although changes to the policy or process would have to be initiated by the minister of Indian Affairs and Northern Development and approved by the Cabinet, the commissioner's report to the standing committee would serve to raise problems for public discussion, thereby increasing the likelihood of government response. His annual report also could comment upon the progress being made on all accepted claims; the progress of claims under active negotiation; the application of access criteria; the appropriateness of decisions made by the funding agency; and the overall effectiveness and fairness of the claims policy.

The commissioner's line of communication with the standing committee would create another means of promoting progress in negotiations. His power to call meetings with negotiating parties and to request information from them would enable him to identify reasons for a lack of progress. If unable to restore progress to the negotiations he could report to the standing committee outlining the reasons for the delay and his recommendations for restoring progress. An airing of the problem before a committee of the House of Commons should act as an incentive to both parties, particularly the federal government, to work out their differences.

The commissioner's authority to recommend that negotiations be temporarily or indefinitely suspended is important. Temporary suspension could provide a "cooling off" period in which both parties could reconsider their position or seek a renewal of their mandate. Temporary suspension should not result in any loss of funding to the aboriginal group. An indefinite suspension would have a tremendous effect upon the aboriginal group yet very little upon the federal government. Therefore, this step should be considered by the commissioner only in the most extreme circumstances when the aboriginal group is exclusively responsible for the persistent lack of progress in negotiations. Because there are so many aboriginal groups waiting to enter active negotiations, it is unfair to allow groups that demonstrate little or no interest in reaching agreements to monopolize the limited resources available for negotiations.

We do not envision a mini-bureaucracy being built around the commissioner. The office would not be expected to conduct exhaustive and time-consuming research, but could serve as a repository for information, documents, and research data collected by the negotiating parties, which could be made available to other groups. Any independent research should be limited to the collection of facts to assist the commissioner's function. We estimate that one full-time professional assistant, secretarial support staff, and a budget for contracted mediation work would be sufficient.

REVIEW OF DECISIONS ON ACCESS

Currently, claims are submitted for review by the Department of Indian Affairs and Northern Development. The initial filing requirement is minimal because the Office of Native Claims [land claims programme] usually hires external consultants, or fact-finders, or both, to advise whether the claim is based upon traditional use and occupancy and whether it generally meets the criteria for acceptance. The Department of Indian Affairs and Northern Development should continue to make the initial decision as to whether a submitted claim meets the criteria for access to the comprehensive claims process. This decision should be made within a reasonable time, and, in any case, within a maximum of twelve months after the claim is submitted.

Although very few claims have been rejected so far, adequate reasons for rejection have not always been made available. The rejection of a claim leaves the aboriginal group with relatively few options. It can litigate, or it can seek remedies through other processes, such as self-government discussions or treaty renovation. Because it is very serious for a group to have its claim rejected, we believe that if a claim is rejected, written reasons for the decision should be provided. This action will help the group to evaluate the

other options it may have. Furthermore, if a claim is rejected, the group should have the opportunity to appeal the department's decision to the minister.

The Commissioner for Aboriginal Land Claims Agreements should oversee the application of criteria for access to the process. In an annual report to the standing committee, he could comment upon whether criteria are being applied fairly and consistently, and upon whether a need exists either to broaden or to restrict the criteria.

This combination of timely decisions, reasons for rejection, an appeal to the minister, and the commissioner's annual review of the application of criteria for access should help to make decisions on access more open and equitable.

FRAMEWORK AGREEMENTS

Before embarking upon substantive negotiations, it is essential for the parties to develop an appreciation for each other's expectations. This knowledge should help to expedite the negotiating process by providing an early identification of topics on which the expectations of the parties are widely divergent. In such cases, neither party should waste its time or resources in fruitless negotiations. Unproductive negotiations not only waste time and money but also are unfair to other groups whose claims have been accepted but not yet accommodated on the short list for active negotiation. Before the substantive negotiation of a claim begins, the parties should negotiate a framework agreement. The framework agreement would outline the scope of negotiations, anticipated time frames, funding arrangements, process of ratification, and interim implementation of sub-agreements, and would indicate the elements of the agreement that might be expected to be certain as opposed to flexible. The achievement of a framework agreement would help to provide a structure and a positive, constructive atmosphere for the negotiations that will follow. In one sense, the framework discussions would be nothing more than a set of meetings to establish an agenda for the negotiations. The framework agreement would serve as a memorandum of intent, and, although not binding upon the parties, would set the context for the later substantive negotiations.

A framework agreement should deal with a limited number of essential matters. It should outline the scope of the substantive negotiations, namely, the items that each party intends to discuss. Agreement also should be reached concerning which elements of the agreement are intended to be certain, and which should be subject to periodic review and possible adjustment. Target deadlines for the achievement of agreement should be set, and consensus should be

reached on the order in which items will be addressed. Discussion also should take place concerning the means by which each side will procure ratification of the agreement from its constituents. Although the procedure for ratification is a matter for each party to determine by itself, it must be acceptable to the other party, because, if it is not, negotiations will be in vain. Thus, any difficulties with a proposed method of ratification should be identified early. The framework discussions also may explore the extent to which sub-agreements on various topics might be implemented during the course of negotiations.

At this point, arrangements should be made for the funding of the aboriginal group. Although such arrangements may have to be adjusted later, funding commitments will help both the aboriginal group and the funding agency to plan their activities.

The framework agreement would enable the negotiators to obtain a mandate and to begin to develop proposals and options for presentation during the negotiations. A serious failure to adhere to deadlines agreed upon in the framework agreement may signal the emergence of problems in the negotiations that the commissioner could perhaps help to resolve.

The failure in the past to achieve an early sense of the possible outcome of negotiations has led to frustration on both sides. The achievement of framework agreements should provide a sense of progress and an agenda for subsequent discussions.

Because the list of topics to be addressed is relatively short, we believe that it should be possible to conclude a framework agreement in a particular negotiation within a relatively short time, namely, six to nine months depending upon the size and geographic distribution of the aboriginal group. This period would include the time necessary for the group to prepare itself for participation in the framework discussion. Although the framework agreement would not bind the parties, its achievement would be a prerequisite to acceptance of the claim onto the short list for active negotiation.

GOVERNMENT AS A NEGOTIATING PARTY

Government's Role in Negotiations

Past negotiations have suffered from a fundamental flaw in the process in that the federal government's stance in negotiations has tended to be reactive. Most of the ideas discussed at the negotiating table have originated with the aboriginal groups, and government participants have merely reacted to these instead of bringing forward positive proposals of their own.

This situation has caused frustration on both sides. To many aboriginal negotiators, the response of the federal government has generally been perceived as negative. Affected federal departments often have not had the opportunity to feed positive ideas into the process at an early stage, which they have found to be an unsatisfactory situation. This state of affairs may even have contributed to the lack of interest of certain departments, and their sense that the resolution of claims is not an important priority.

The federal government's role as a party in the negotiating process should be more constructive. The government should develop positions for discussion at the negotiating table, and not merely react to proposals put forward by the aboriginal group.

Our earlier recommendations suggested ways in which the carriage of negotiations could be separated from the monitoring of the negotiating process. This differentiation should help to balance the process somewhat, and to remove at least one of the federal government's conflicting roles. The development of framework agreements before the substantive negotiations begin also should improve the federal government's performance in negotiations.

A framework agreement would enable each chief negotiator to work out a variety of options and proposals for discussion in negotiations, and to involve various affected departments at this early stage in the development of options. The Cabinet's approval of a series of options, within a possible range, would constitute the chief negotiator's initial mandate for negotiations, and would ensure that affected departments are agreeable to key proposals.

It is recognized that each negotiation is different, and that each negotiating situation requires flexibility. Each chief negotiator will have to report on the progress of the negotiations from time to time, of course, and to seek minor adjustments to his mandate. Moreover, as negotiations move forward, alterations to the framework agreement may be necessary.

Nevertheless, we believe that the approach we recommend would enable the federal government to develop its own proposals at an early stage, and to play a more positive role in the negotiating process.

Chief Federal Negotiators

In the past, most chief federal negotiators have been selected from outside the civil service. Although this practice has enabled the selection of individuals who have been viewed by many aboriginal groups as independent of government, it has proved costly. In some cases, the chief negotiator's unfamiliarity with the organization of government has impeded progress; sometimes the chief negotiator has been viewed with suspicion from within the civil service. Because the chief negotiators have had other responsibilities, they have not always been able to devote their full attention to the claims. In the

interests of seeing progress in negotiations, we recommend that the chief negotiators should be available to work full time on the settlement of claims.

Because our suggested adjustments would better balance the negotiating process, it should no longer be essential to choose chief negotiators from outside the civil service. Thus, the best-qualified persons should be selected for the job, whether they are from the Department of Indian Affairs and Northern Development, another federal department, a provincial or territorial government, the private sector, or elsewhere.

Chief negotiators should report directly to an assistant deputy minister in the Department of Indian Affairs and Northern Development. The negotiators responsible for claims north of 60° also may report indirectly to the associate deputy minister responsible for the effective co-ordination of the processes involved in northern political development.

It is important that the chief negotiators have an opportunity to interact regularly for the purpose of sharing their experiences, successes, and failures. Chief negotiators should be encouraged to communicate with one another on a regular basis.

In selecting its chief negotiators, the federal government should seek a number of qualities. The ideal candidate would have experience in negotiations and knowledge about aboriginal matters and about the structure of the government. If the candidate is a federal civil servant, he should hold a senior position.

It is important that the federal government have confidence in its chief negotiators; thus, it should select them as freely as does the aboriginal group. Many aboriginal groups have urged that their agreement be obtained before the selection of the federal negotiator; however, we see no reason why the government should be required to consult with the aboriginal group in this decision. This practice was required in the past when the claims process was tipped more heavily in the government's favour. In those circumstances, the chief negotiators sometimes acted more as mediators than as negotiators. This role, which we have recommended for the Commissioner for Aboriginal Land Claims Agreements, is one that the federal chief negotiators should no longer have to play. With greater balance in the process, it should not be necessary for one side to be consulted in the selection of the other side's negotiator.

CO-ORDINATION OF GOVERNMENT DEPARTMENTS

Comprehensive claims and the terms of settlements inevitably reach beyond the mandate of the federal Department of Indian Affairs and Northern Development (DIAND). Precisely because these agreements are comprehensive, they involve programmes and policies that are the responsibility of other federal departments, such as the departments of Fisheries and Oceans; Finance; Environment; Health and Welfare; Energy, Mines and Resources; and the Treasury Board. In the past, it often has been difficult to develop a positive relationship between these departments and the claims negotiating process. Departmental representatives participating in negotiations have lacked a clear mandate to work creatively towards the reconciliation of their departments' concerns and the objectives of the claims settlement. As a result, established departmental positions have become immovable barriers to progress in the negotiations.

A common complaint is that the federal government's inability to agree upon its own position has caused serious delays in negotiations. Various interdepartmental co-ordinating committees involving ministers, deputy ministers, and other officials have been attempted as means of ensuring co-ordination and approval of negotiating positions by all relevant departments. Although some of these attempts at co-ordination have had merit, the committees have been unable to overcome the resistance from those departments unwilling to modify their general policies to secure effective agreements.

We recommend that the participation of federal government departments should be co-ordinated by the Department of Indian Affairs and Northern Development.

Clearly, however, more than co-ordination is needed. No recommendations for better interdepartmental co-ordination would accomplish very much in the absence of a stronger commitment by the entire federal government to the claims process. Thus, we recommend that affected departments should have an early input into the formulation of the government's proposals and options, and a method of ensuring that the approved government position is respected by all departments.

Although affected departments should play a meaningful role in the development of the federal government's position, individuals from these departments should participate in negotiations only when requested to do so by the chief negotiators, who should be in a position to ensure that the government is represented by the most capable and appropriate individuals.

There must be the will within the federal government to give some priority to the successful conclusion of claims agreements. Only the Cabinet can express that will and can communicate it to all departments and agencies involved in the settlement process.

Recommendations were made to the task force that responsibility for claims be moved to a more powerful ministry or to the prime minister's office. These recommendations served to emphasize to us the need for a stronger commitment by the federal government as a whole to the achievement of fair and lasting agreements with aboriginal peoples. We believe that the responsibility for claims should remain with the Department of Indian Affairs and Northern Development, where aboriginal claims issues are an important priority. The current reorganization within the department promises to give the comprehensive claims process higher priority. In our view, although other departments may wield greater authority within the government, resolution of claims would be for them a secondary priority at best.

As part of our recommendation for a new negotiating process, we have proposed the idea of framework agreements. Discussions on the framework agreement should result in a common set of objectives for the subsequent negotiations. After an agreement on objectives, the federal government will be in a position to develop several options for meeting them. This phase of the process will be extremely important and will require the active, positive participation of all departments involved. The options developed at this phase will become the mandate of the federal negotiator and, thus, should have the approval of senior officials and of the Cabinet.

Once a new claims policy is approved by the Cabinet, other departments must be encouraged to give implementation of the policy their support. Where unforeseen conflicts occur between this policy and other governmental policies, they should be resolved by the ministers concerned or by the Cabinet, rather than by departmental officials. If it is to succeed, the approach we have recommended must have the strong support of the Government of Canada so that all who participate in the process on behalf of the government do so in a constructive and creative manner.

SHORT LIST

A short list should be maintained by the land claims programme (DIAND) to determine the order in which accepted claims will be actively negotiated. This list should be expanded to permit active negotiations with more than six groups at a time. It should be flexible so that groups awaiting negotiation could be added and other groups removed if their negotiations were to stall indefinitely.

The short list designates the aboriginal groups whose claims are under active negotiation with the federal government. The current limit of six has been determined by the federal government's financial and organizational capacity to negotiate and implement settlements.

Some of our recommendations, we believe, would help to streamline and expedite the claims process, in which case it is appropriate to consider whether the current limit of six could be raised. The problem is most acute in the Province of British Columbia, where a large number of claims have been accepted but only one is under active negotiation. For several years many groups have been fully prepared to negotiate but foresee no prospect for active negotiations. Particularly when their traditional area is subject to continuing third-party alienations and development projects, the current policy gives them little reason to see negotiation as a suitable means of resolving their claims.

We believe that the cost of increasing the number of claims under active negotiation would be marginal, particularly because most of the outstanding claims are from the same geographic area. Indeed, an exchange of ideas and a momentum could develop that could have an extremely positive effect upon the success of negotiations in British Columbia.

Groups that are not on the short list should be kept informed about their prospects. This information would reduce their need to retain unnecessary research staff, and would enable them to plan effectively for their participation in active negotiations.

In extreme circumstances, the Commissioner for Aboriginal Land Claims Agreements might propose the indefinite suspension of a particular negotiation, as a result of a lack of progress. If the commissioner's advice were accepted, the removal of one group from the short list would enable the addition of another.

FUNDING

Negotiation of claims can be accomplished only if the negotiating groups are financed adequately. However, when the agency responsible for the conducting of negotiations for the federal government also controls the funding of the groups with which it is negotiating, perceptions arise that funding is being used as a lever in negotiations. Because the Department of Indian Affairs and Northern Development will continue to co-ordinate the government's role in negotiation, we recommend that funding for aboriginal groups involved in the comprehensive claims process should be administered by the Secretary of State.

The Secretary of State currently provides funding to aboriginal groups for a number of activities, and thus is a suitable agency to administer claims funding.

The issue of whether funding for negotiations should be provided through grants or loans has been the subject of considerable controversy. Some groups in the claims process object to having to use their own settlement money to negotiate agreements concerning aboriginal rights. Other groups feel that use of moneys that are ultimately their own reduces their sense of dependency on the federal government. The federal government has advocated the loan mechanism so that aboriginal leaders will feel more accountable to the prospective beneficiaries of the agreements and less accountable to the government for the use of funds.

It is difficult to determine whether the amount of compensation provided under claims agreements is in fact reduced by the amount of the loans from the federal government. Thus, the question of whether the loan is repaid from settlement funds seems to be one of principle rather than of practicality. The most important issue is how to provide funding in a way that will further the purpose of fair and expeditious negotiations. Because funding for claims negotiations is finite, it should be used where it will be most effective in accomplishing this goal. Therefore, the emphasis should be placed upon funding for groups that are in active negotiation, or that are close enough to the short list to begin discussions on a framework agreement.

The negotiation of a framework agreement in advance of active negotiations should help to rationalize the funding process. At the appropriate time, any group should be entitled to a grant that would enable it to negotiate a framework agreement and to prepare for active negotiations. As mentioned earlier, funding arrangements for the substantive negotiations would be discussed during the framework negotiations. In this way, funding requirements could be tied to the timetable for substantive negotiations that is worked out in the framework agreement.

Once substantive negotiations begin, funding should be provided in the form of interest-free loans, the details of which should be specified in the framework agreement. This provision would encourage groups to adhere to the agreed-upon timetable and would inhibit the possibility of negotiations becoming a way of life.

In the next section we recommend that in areas for which there is more than one claim, no settlement should be made until the overlapping claims have been resolved by the aboriginal groups. Because the federal government's role in achieving this should be supportive, there may be a need to fund groups that are attempting to negotiate their overlapping claims. Where necessary to facilitate the resolution of overlapping claims, funding should be provided through contribution agreements. Priority should be given to funding the resolution of overlaps with groups in active negotiation.

Although our recommendations would result in the removal of funding decisions from the Department of Indian Affairs and Northern Development, funding would still flow from the federal government. Thus, the Commissioner for Aboriginal Land Claims Agreements may wish to monitor the effectiveness of funding arrangements and to comment upon funding issues in reports to the House of Commons Standing Committee on Indian Affairs and Northern Development.

OVERLAPPING CLAIMS

Situations exist in which the area traditionally used by one aboriginal group also is used by another. Many groups have declared that they are best able to resolve such overlaps by themselves; others feel that the federal government should take a more active role in resolving issues of overlap. Where the traditional use and occupancy of one aboriginal group overlaps geographically with that of another, the claims should be resolved by the groups themselves. If requested by the aboriginal groups, government and the Commissioner for Aboriginal Land Claims Agreements should help to facilitate resolution of the overlap by providing independent fact-finders and mediation services.

Where an overlap remains unresolved, however, we think it would be unfair to recognize the rights of one of the competing groups to the detriment of another. Thus, rights in the overlap area should be recognized only after the overlap has been resolved. However, failure to resolve the overlap should not impede settlement of aspects that deal with other parts of the traditional area.

In the previous section we proposed a mechanism for funding the resolution of overlapping claims. Groups should be encouraged to engage in discussions about their overlapping claim as early as possible in the negotiations.

ELIGIBILITY

Group Eligibility for Negotiations

The autonomy of aboriginal peoples in determining the structures and units through which they wish to negotiate claims should be respected. Thus, under normal circumstances, there should be no question as to

the aboriginal organization with which the federal government should negotiate a claims settlement for a particular area. Occasionally, however, questions may arise about whether an agreement should be negotiated with a smaller unit claiming a portion of the area or with the larger organization covering the whole area.

In determining the group that is eligible to negotiate a comprehensive claims agreement, the federal government should respect the aboriginal peoples' traditional groupings and organizational structures. Aggregation should be encouraged to the highest level acceptable to the aboriginal communities involved. The government should avoid taking positions that would foster the fragmentation of aboriginal organizations, which would exacerbate overlap problems and add considerably to the complexity and costs of negotiations. Aggregation of claims should not be pushed to the point at which aboriginal peoples with quite different perspectives and aspirations are forced to negotiate together. The mistake of trying to negotiate with an organization representing peoples with fundamentally different objectives is bound to affect the pace of negotiations and to jeopardize the prospects of ratification.

Eligibility Criteria for Benefits under Agreements

We respect the right of aboriginal groups to determine their own membership. These groups have a sense of their own identity, and should be free to decide how the rights and benefits of a claim agreement should be shared. Each aboriginal group should develop its own criteria concerning individual eligibility for the benefits of claim agreements. This recommendation is consistent with recent amendments to the Indian Act that have given Indian bands control of their membership. Moreover, the movement towards self-government makes self-identification appropriate.

The eligibility criteria must be based on fair and equitable principles. No aboriginal group should be permitted to develop eligibility criteria that are arbitrary either in content or in application. Also, because funding for the process and for implementation of agreements will come from the public purse, eligibility for benefits should be made available only to Canadian citizens of aboriginal descent.

In some cases, members of the same aboriginal society reside in different political jurisdictions. As a result, separate agreements may be reached covering members of the group on either side of the border. In other cases, individual aboriginals or aboriginal communities may have traditional ties to other groups that have signed separate agreements.

Earlier we stated that the group as a whole should not be prejudiced by the fact that its traditional lands are dissected by a political boundary. Neither should individuals be favoured as a result of the same fact. Where the eligibility criteria for comprehensive claims agreements entitle individuals or communities to participate fully in either agreement, those individuals should be required to select the agreement in which they will be full beneficiaries.

Individual members of an aboriginal group should not be permitted to participate in the full benefits of more than one comprehensive claim agreement.

If they choose to be full beneficiaries in the agreement covering the jurisdiction in which they reside, they still may be entitled to partake of non-resident benefits negotiated on their behalf under the other agreement. If they prefer to participate fully in an agreement outside their place of residence, they would still be entitled within their place of residence to the same benefits as those negotiated for non-resident members of their group.

PUBLIC EDUCATION

Land claims are not well understood by most Canadians. Some may support them as simply another way of delivering social services to aboriginal communities; others see them as ridiculous attempts to "give the country back to the natives." We suspect that few Canadians are aware of the historical or the constitutional basis for land claims or appreciate the contributions that lasting agreements can make to the development of this country.

Non-aboriginals in areas where claims are filed and negotiations begin sometimes fear the effects that agreements may have upon their lives and on their ability to earn a livelihood. Some of these fears are understandable. Aboriginal groups lay claim to large areas of land or resources that are also important to local non-aboriginal communities. Negotiations proceed behind closed doors, and the information made available to the public often paints a distorted picture of what is under consideration. Individuals, companies, municipal governments, and other local organizations do not feel that they are well represented during the negotiations. Often they fear the worst and mount opposition to the process before agreements are reached.

Both the aboriginal and the non-aboriginal communities in their region are there to stay. If an objective of the claims policy is to build lasting relationships between aboriginal and non-aboriginal Canadians, the process should begin now to assist in building understanding between them.

Better public understanding of the process can be achieved in a number of ways. We have recommended that third-party interests should be respected by the negotiations, and also have suggested that third parties holding interests in the claim area should be consulted by government to provide input at the early stages of negotiation. The aboriginal groups themselves may wish to consult with affected third parties. We also recommend that the federal government co-operate with aboriginal groups to mount a public education programme early in the process in regions where claims are made to inform local citizens of the policy, the claims filed, the process for the negotiations, and the objectives of agreements. Some aboriginal groups already have developed excellent information materials that could be used for this purpose. The public should be educated as to how the claims policy protects their interests and should be given information on how to make their views known to the government or aboriginal negotiators.

When a claim is accepted by the federal government, a programme of general information on the claim and the claims policy should be initiated. Once negotiations begin, this information should be supplemented with a programme of public consultation initiated by both government and aboriginal negotiators.

Agreements will result in change at the local, regional, and national levels that will be unsettling and difficult for some people. Most aboriginal groups understand, however, that agreements will work best where there is general acceptance of their terms and objectives. A public education programme would help to prepare local communities for the changes and opportunities that an agreement would bring.

IMPLEMENTATION OF AGREEMENTS

Once negotiations are completed and agreements have been signed, the real challenge begins---the implementation of the agreement. After the signing of treaties or recent claims agreements, the federal government, lacking a strategy or structure for implementing the terms, often has failed to meet either the spirit or the letter of its commitments. Little consideration has been given to the administrative and other costs of implementation. Some of the difficulties of implementation could be overcome if government were to

consider, before the completion of negotiations, how and when implementation would take place. The key question of "who will be responsible for implementation?", along with the mechanisms for implementation, should be considered before the negotiations are completed.

The Commissioner for Aboriginal Land Claims Agreements should monitor the effectiveness of implementation. The strengthening of the government's political will to honour its commitments on claims would improve the prospects for full and fair implementation of agreements.

The costs, mechanisms, and timing of the implementation of agreements should be considered carefully by the government and should be discussed during negotiations. If necessary, a sub-agreement on implementation should be negotiated.

Phased Implementation

Comprehensive claims agreements have been very complex documents reaching into many facets of aboriginal life and interaction with Canadian society. Implementation of the whole agreement has been an awesome task for both the federal government and the aboriginal peoples.

To improve the ability of both sides to implement agreements, consideration should be given to phased implementation, in which certain matters agreed to in the course of negotiations could be implemented in advance of the complete agreement.

The current requirement for complete agreement on all items before implementation has caused considerable frustration, for it is impossible to implement an entire agreement in one magic moment. Phased implementation would help to ensure that confidence in the agreement is not lost in the first years, and also could facilitate long-term planning for both aboriginal groups and government.

Portions of agreements (sub-agreements) should be implemented before completion of an agreement. The timing of the implementation of sub-agreements and the complete agreement should be the subject of negotiation.

Implementation of sub-agreements prior to a complete agreement would present advantages and disadvantages to governments and to aboriginal groups that would have to be weighed carefully by the parties. Phased implementation could serve as an incentive to move more quickly towards a complete agreement. It would allow both government and aboriginals to see tangible progress, and the benefits of negotiations would become a reality. Although this same progress

might also serve as a disincentive to reach a complete agreement if aboriginal or government objectives were met in large measure by the sub-agreement, we believe that, on balance, phased implementation would improve the climate for negotiation and would lead to speedier conclusion of the complete agreement.

Phased implementation also could provide both parties with valuable experience with agreements and their implementation, which should assist the negotiation and implementation of the remainder of the agreement. As mistakes or unworkable terms are discovered, they could be adjusted before the signing of a complete agreement.

Subjects that may be appropriate for phased implementation are those that require some flexibility, for example, land- and resource-use management, training, and education. Issues such as monetary payments and land rights require certainty, and may best be left until a complete agreement is signed. Some subjects of negotiation may involve tradeoffs, for example, recognition of a larger land base may result in a smaller share of resource revenues. These subjects may be inappropriate for phased implementation.

Phased implementation could pose administrative challenges for government, and may have cost implications. Such problems can be overcome, however, if the will exists. We are convinced that the long-term benefits of phased implementation would be worth the cost.

Adjustment

Agreements can always be amended with the consent of all affected parties. Given the advantages of flexibility that we have advocated elsewhere in this report, however, a process of adjustment should be part of the agreement. To meet their objectives, agreements must be kept up to date with changing circumstances.

An early review of an agreement would allow both parties to make adjustments to it based upon experience. This review would be useful in resolving disagreements over the interpretation of the agreement, in reviewing its performance against its objectives, and in addressing any problems that it may inadvertently have caused. It would give aboriginal groups and governments an assurance that early in the life of the agreement there will be an opportunity to address the failure of either side to carry out its responsibilities and to correct errors in the agreement.

A periodic review should be built into each agreement to examine its performance against its objectives. Flexible elements of agreements should be adjusted to ensure that objectives are being met. The first review should take place a few years after implementation, with subsequent reviews at longer intervals.

Later reviews, which would be required to ensure that agreements have been kept up to date and remain relevant in their time, should be scheduled at longer intervals. Changes in aboriginal communities and Canadian society over the last twenty-five years have been dramatic;

thus comprehensive agreements, which include wildlife management, economic development, education, cultural enhancement, and political institutions, should be reviewed over the next 50 and 100 years and beyond to ensure that they are responding to changes in society.

Such automatic reviews should not preclude the adjustment of agreements at any time at which the parties perceive the need. For example, a definition of aboriginal rights under the Constitution, decisions by the courts, or changes to the environment might dictate a change in the agreement.

Building a positive relationship between aboriginal and non-aboriginal communities in Canada will require flexibility and openness to change. The closed approach in earlier treaties has led to failure, bitterness, and frustration. If adjustment allows agreements to remain current and relevant, the reviews could become a time for celebration, not recrimination.

Arbitration

All parties to the agreement must be responsible for its implementation. Agreements signed by the Government of Canada must be honoured fully, for they will never be able to meet their objectives if the terms are not met. Grievances based upon a perceived or real failure to implement the terms of the agreement cannot be allowed to remain unresolved; thus, a process for dealing with disputes outside the courts should be negotiated as part of the agreement.

Agreements should provide for discussion between the parties as the first step in resolving any disagreement about implementation. Discussion offers the least expensive and most consensual solution. If claims agreements can be achieved, disputes about implementation also should be capable of resolution through discussion. Solutions agreed to by both parties are more likely to solve problems without bitterness than resolution by arbitration or by the courts.

When disagreements cannot be resolved by discussion within a reasonable time, they should be resolved through arbitration. The process of arbitration should be negotiated under the agreement. An agreement could provide for a single arbitrator or for a three-person board, each party naming its representative and both representatives agreeing on an impartial chairman. The agreement also could provide for a combination of arbitrators and boards, the boards being used to resolve disputes of greater importance. Finally, it could provide for a process by which one party could, in some cases, choose a process of speedy arbitration in which the delays would be shortened dramatically. The arbitrator or the board might have the specific authority to make immediate verbal rulings.

Arbitration has been an inexpensive, quick, and effective way of resolving disputes in other contexts. Commercial arbitration has long been used as a substitute for court action in the settlement of disputes, and international arbitration has been used successfully for settlement of differences between nations.

Labour—management arbitration has successfully supported the collective-bargaining system, has contributed to avoiding strike and labour disturbances in many countries, and is still growing as an effective mechanism with which to resolve labour disputes. One of the keys to its success is that awards rendered are widely accepted and complied with.

The Government of Canada has a good record of acceptance of arbitration awards in the labour field, and a similar good record should be developed in the arbitration process recommended here.

Monitoring of Implementation

Parliament has a legitimate interest in the implementation of agreements, because it is likely to play a role in their enactment through legislation. Although the James Bay and Northern Quebec Agreement required the minister of Indian Affairs and Northern Development to report annually to Parliament on the implementation of the agreement, only one such report has been tabled in the past ten years.

Reports on the implementation of an agreement should be made by the Commissioner for Aboriginal Land Claims Agreements rather than by the government department responsible for implementation. The commissioner should include such matters in an annual report to the House of Commons Standing Committee on Indian Affairs and Northern Development. These reports need not be the result of extensive research; however, where major problems persist, the committee may decide to undertake a more thorough review of the agreement in question.

With an independent role, the commissioner also would be in an excellent position to facilitate the negotiation of disputes about implementation. He could assist in establishing any arbitration process, but should not participate directly, as this could compromise the independence of the office.

The annual report to the House of Commons Committee by the Commissioner for Aboriginal Land Claims Agreements should comment upon progress in the implementation of agreements. The commissioner should be available to assist in the resolution of disputes about implementation when requested, and should also be able to assist in establishing arbitration processes. The commissioner should not, however, serve as an arbitrator.

Implications for Canada

CHAPTER 6 IMPLICATIONS FOR CANADA

In weighing the merits of our recommendations it is essential to consider their fundamental objective: to establish a better policy for the negotiation of comprehensive claims settlements with Canada's aboriginal peoples. Although our recommendations to achieve that end certainly can be improved upon, we are confident that the objective is worth pursuing. Indeed, for Canada, at this stage in its history, no other alternative would be practical.

The status quo is clearly unacceptable. The comprehensive claims policy that has been in place for the last dozen years has been almost totally ineffective. It has cost the Canadian government and aboriginal communities millions of dollars, yet has produced few settlements and much frustration. If this policy were continued, aboriginal groups would likely give up negotiating and would have to use the courts and political demonstrations to assert their rights. We do not think that litigation or extra-legal action can produce settlements that are in the best interests of either aboriginal or non-aboriginal Canadians.

One radical alternative would be to abandon the effort towards negotiated settlements and to impose a legislated solution on aboriginal societies with unextinguished aboriginal rights. We did not consider this alternative because it is unacceptable both to the Government of Canada and to the aboriginal peoples. Moreover, we remind those who may be attracted to it that the entrenchment of existing aboriginal rights in the Canadian Constitution probably has put this option beyond the powers of any Canadian legislature. Even if there were no constitutional bar, we think that such a non-consensual approach should be repudiated as being incompatible with what is best in the Canadian tradition.

Thus, there is no alternative but to work out a policy that will provide a sound basis for fruitful negotiations. The necessary short-term costs of executing such a policy can, we believe, be justified amply by the long-term benefits that it is likely to produce.

The purpose of the monetary component in aboriginal land settlements should be neither to buy the lands from the aboriginal peoples nor to compensate them for past damage, but rather to provide a foundation for their economic self-sufficiency. All Canadians, both aboriginal and non-aboriginal, have much to gain through such an approach. Encounters between Canada's dominant society and its aboriginal peoples have, all too often in the past, produced a relationship of dependency of the latter on the former. Such a relationship has been bad for all concerned. It has resulted in steadily mounting expenditures of public funds and a continuing erosion of the self-respect and self-confidence of aboriginals.

Expenditure on satisfactory claims settlements now must be seen as an investment in a more positive and productive future for aboriginal peoples and for the land they inhabit and use. The relationship of dependency must be replaced by one based on sharing and mutual development. Fortunately, there are vast areas of Canada where it still is not too late to tap the genius of the peoples who, for so many centuries, have taken their living and their identity from lands and waters that others find so forbidding. By negotiating adequate settlements now, Canadians will have some assurance that these peoples can continue to live and flourish on these lands for centuries to come.

Prospects for the development of both the renewable and the non-renewable resources on so much of the land in question currently are clouded in uncertainty and blocked by conflict. The successful negotiation of claims settlements should remove these obstacles to development. A clear definition of legal rights and mutually agreed-upon decision-making instruments will overcome the uncertainty and will release the energies of both aboriginals and non-aboriginals for more constructive tasks.

More than economic interests are at stake in the successful resolution of land claims. An acceptable policy must deal justly with the rights of all those affected by claims settlements. Settlements cannot be successful if they aim at denying the rights of either aboriginal or non-aboriginal Canadians. Moreover, the recognition of aboriginal rights should not be viewed as detracting from individual rights. For aboriginal Canadians whose sense of identity and self-worth derives so much strength from their aboriginal roots, the enjoyment of individual rights has little meaning without the possibility of participating in vibrant and distinctive aboriginal communities.

In so far as claims settlements contribute to the development of such communities, they assist in extending to Canada's aboriginal peoples the bedrock of principle on which the Canadian Confederation has been built. That principle has meant that Canadians from a variety of backgrounds have been able to contribute to the building of

this nation and to participate in its benefits without surrendering that part of their particular heritage that gives meaning and value to their lives. At times in our history it has not been easy to adhere to this principle, yet adhering to it has become the Canadian way.

The Canadian tradition is rich in the range of mechanisms through which this principle has been expressed. The Constitution Act, 1867 and the Constitution Act, 1982 recognize and protect the English—French dualism that underlies the original compact on which Canada was founded. The Charter of Rights affirms the multicultural nature of contemporary Canadian society. Recognition of aboriginal rights in the Constitution Act, 1982 confirms Canada's commitment to the enduring participation of its aboriginal peoples as distinct partners in Confederation. Comprehensive claims agreements provide a forum through which Canadians can give a practical application to this ideal.

Within the international community, increasing recognition is being given to the responsibility of nation states to ensure the survival of their indigenous peoples. At the United Nations, Canada has been called to account for its treatment of aboriginal peoples. If it is to have credibility in promoting the observance of human rights by other countries, Canada will have to demonstrate its willingness to respect the rights of its most vulnerable peoples. As Canadians, we should judge ourselves, and we may well be judged by others, by our willingness to do the right thing, even when—and especially when—it costs us something.

Much is at stake in working towards consensual settlements with those aboriginal peoples who have never entered into agreements concerning the destiny of their traditional lands within Canada. In the deepest sense, what is at stake is our identity as a nation that resolves its internal differences not through coercion or domination by the majority, but through agreements based on mutual consent.

This task force does not underestimate the difficulty of extending this principle to the negotiation of comprehensive settlements with the aboriginal peoples of Canada. These negotiations will tax the ingenuity and the goodwill of the governments and communities that participate in them. However, this is a challenge that, we believe, Canadians cannot refuse. No other course can serve our interests and fulfil our sense of justice.

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APPENDIX 1

TERMS OF REFERENCE FOR TASK FORCE

1. The Task Force will review all aspects of the current comprehensive claims policy and make recommendations as to the future policy. Without limiting the generality of its mandate, the Task Force shall specifically review and make recommendations with respect to the following:

   (a) the goals and objectives of comprehensive claims policy;

   (b) issues relating to aboriginal title, including: the finality of settlements; extinguishment; and, aboriginal title superseded by law;

   (c) issues relating to the scope of negotiations, including: surface and subsurface rights to lands and rights to other resources; equity participation, sharing of resource revenues and other economic rents; the roles and powers of management and planning bodies concerned with land, resources, the environment and socio-economic matters, and of other bodies established under claims agreements; offshore rights and management; third party interests; compensation and other forms of economic assistance; the suspension of development activities during negotiations; interim agreements; the ratification, implementation and enforcement of agreements; and the amendment of agreements;

   (d) issues relating to overlap, including: claims that overlap provincial or territorial boundaries; and claims that overlap other claims;

   (e) claims funding;

   (f) the role of provincial and territorial governments in negotiations;

   (g) regional aspects of claims policy;

   (h) issues relating to process, including: access to negotiations, that is, the review and acceptance of prospective claims, and the number of claims that are negotiated at any given time; the structure and resources of federal negotiating teams, including the manner of appointment of chief federal negotiators, the role of claimant groups in that process, and the financial and human resources made available to chief federal negotiators; and, the mandates and accountability of chief federal negotiators; it being understood that the Task Force shall respect the view, shared by both the Federal Government and the major claimant groups, that any claims process must be based on negotiation; and

(i) the relationship of claims policy to aboriginal self-government, amendment of the Canadian Constitution, political development in the North, and other federal policies and programs.

2. In conducting its activities, the Task Force shall:

(a) solicit and consider representations from claimant groups, including groups speaking for claims that have been recognized but not actively negotiated and groups speaking for prospective claims, and from provincial and territorial governments;

(b) receive and consider representations from other affected and otherwise interested organizations and individuals;

(c) adopt such practices and procedures for all purposes of the review as the Task Force from time to time may deem expedient, it being understood that the Task Force shall conduct its activities in as informal a way as is practicable; and

(d) within the limits of the Departmental funds made available to it, and subject to the requisite approvals of Treasury Board, make necessary expenditures, including the engagement of the services of researchers and secretaries, the rental of space for offices and meeting rooms, the acquisition of equipment, and the payment of travel expenses.

3. The Task Force will be required:

(a) to submit to the Minister of Indian Affairs and Northern Development, on or prior to November 30, 1985, a report in both official languages in fulfillment of the purposes for which it is established, and

(b) to make available to the Minister, upon request, copies of written submissions made to the Task Force in the course of its review.

(Source: DIAND, Communiqué 1-8523, 4 July 1985.)

APPENDIX 2

SUBMISSIONS AND BACKGROUND DOCUMENTS REVIEWED BY THE TASK FORCE

Submissions

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APPENDIX 3

BIOGRAPHICAL SKETCHES

Task Force Members

Murray Coolican, of Halifax, is the president of Peters, Coolican and Associates Ltd., a consulting firm that deals with native and energy issues. He is a former executive director of the Canadian Arctic Resources Committee and is currently a member of the board of directors. Mr Coolican has worked, for a number of years, in the environment field on behalf of public interest groups, aboriginal organizations, and corporations.

Constance Hunt, of Calgary, is the executive director of the Canadian Institute of Resources Law and a professor of law at the University of Calgary. She has also served as corporate counsel to Mobil Oil Canada Ltd. and was a legal adviser to the Inuit Tapirisat of Canada (National Eskimo Brotherhood).

Joe Mathias, of Vancouver, has been chief of the Squamish Nation (British Columbia) since 1967. He is a spokesman on constitutional issues for British Columbia chiefs and is a member of the Assembly of First Nations Constitutional Working Group. Mr Mathias has extensive experience in economic development activities on behalf of his band.

Peter Russell, of Toronto, is a professor of Political Science, and a former principal of Innis College, at the University of Toronto. Professor Russell is a well-known constitutional adviser and has written on aboriginal land claims.

Guy Dancosse, of Montreal, is a labour lawyer and senior partner in the law firm of Pouliot, Mercure, LeBel, Desrochers, Legault & Dancosse. He has extensive experience in the fields of labour law and negotiation.

Executive Director

Lynn Jamieson-Clark, an Ottawa sociologist with extensive research experience, served until recently as Coordinator of Research and Liaison for the Nunavut Constitutional Forum. She is a former policy adviser with the Department of Indian Affairs and Northern Development.

TASK FORCE STAFF

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Editors
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COMPREHENSIVE NATIVE CLAIMS IN BRITISH COLUMBIA

LEGEND

The area indicated on the map of British Columbia represents only approximate boundaries of the areas in which the various native associations have claimed an interest. The precise delineation of these areas for each claimant group will be determined as negotiations proceed on the separate claims settlements.

(1) Nishga Tribal Council

(2) Kitwancool Band

(3) Gitksan-Wet'suwet'en Tribal Council

(4) Haisla Nation (Kitamaat Village)

(5) Association of United Tahltans

(6) Nuu-Chah-Nulth Tribal Council

(7) Council of Haida Nation

(8) Heiltsuk Nation (Bella Bella)

(9) Nuxalk Nation (Bella Coola)

(10) Nazko-Kluskus Tribal Council

(11) Kaska-Dena Council

(12) Carrier-Sekani Tribal Council

(13) Alkali Lake Band

(14) Atlin Band (Taku Tlingit)

REVENDICATIONS GLOBALES DES AUTOCHTONES EN COLOMBIE-BRITANNIQUE

LEGENDE

Les zones indiquées sur la carte de la Colombie-Britannique ne représentent que les limites approximatives dans lesquelles les diverses associations autochtones ont revendiqué un intérêt. La délimitation exacte de ces zones pour chaque groupe revendicateur sera déterminée au cours des négociations sur les règlements particuliers

(1) Conseil tribal des Nishgas

(2) Bande des Kitwancools

(3) Conseil tribal des Gitksans-Wet'suwet'en

(4) Nation haisla (village de Kitamaat)

(5) Association des Tahltans unis

(6) Conseil tribal des Nuu-Chah-Nulth

(7) Conseil de la nation haida

(8) Nation heiltsuk (Bella-Bella)

(9) Nation nuxalk (Bella-Coola)

(10) Conseil tribal des Nazkos-Kluskus

(11) Conseil des Dénés kaskas

(12) Conseil tribal des Carriers-Sekanis

(13) Bande d'Alkali Lake

(14) Bande d'Atlin (Taku tlingit)

COMPREHENSIVE NATIVE CLAIMS IN BRITISH COLUMBIA

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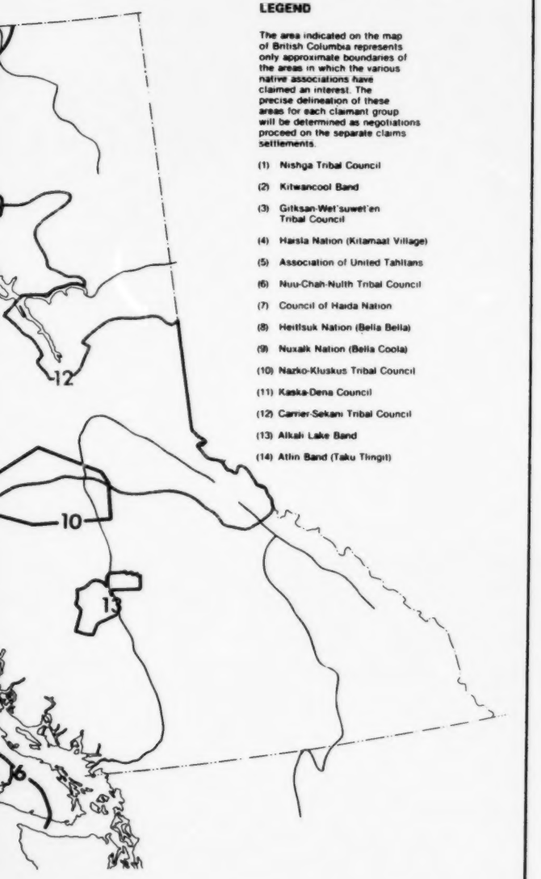
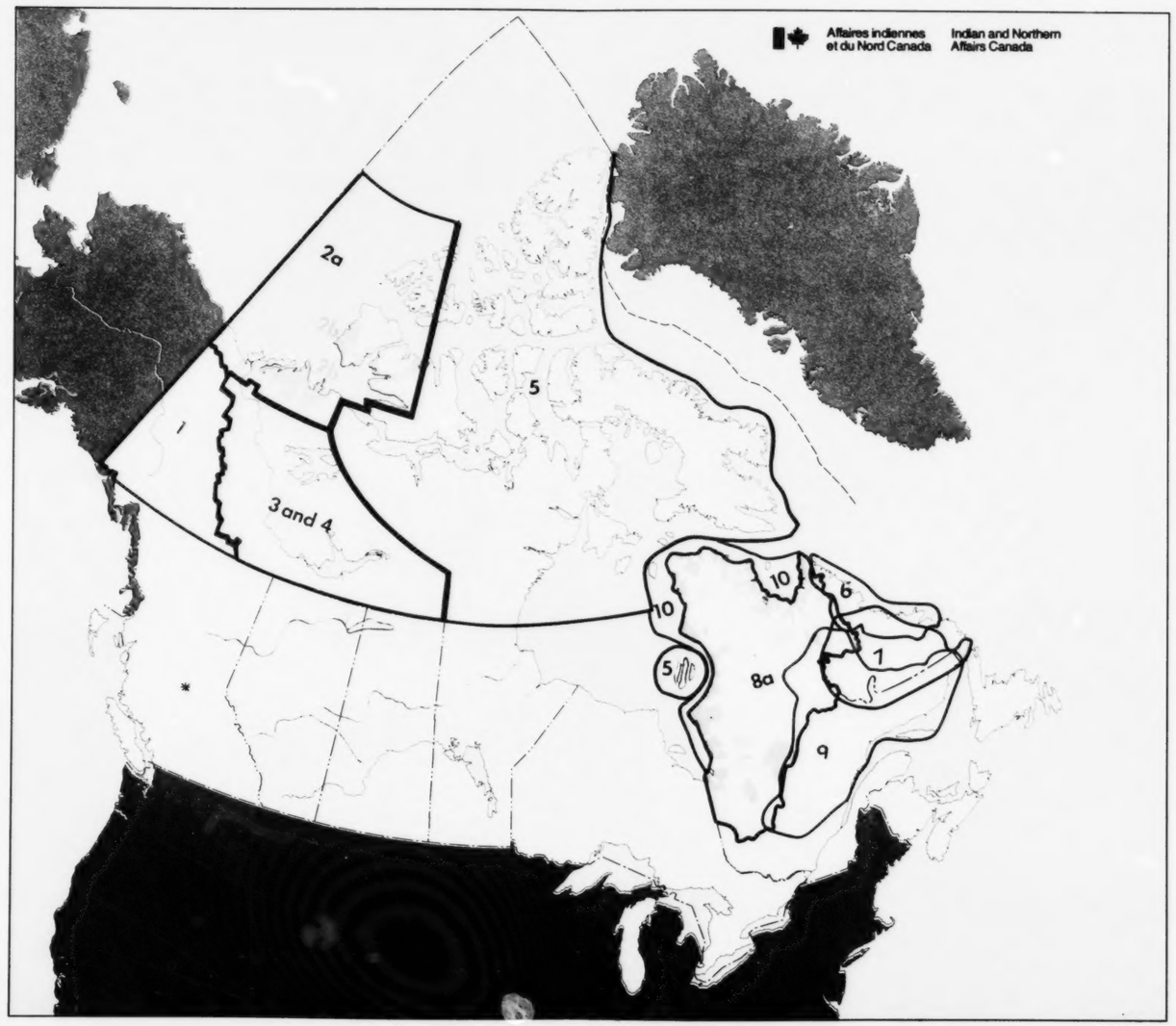
(11) Kaska-Dena Council

(12) Carrier-Sekani Tribal Council

(13) Alkali Lake Band

(14) Atlin Band (Taku Tlingit)





REVENDICATIONS GLOBALES DES AUTOCHTONES AU CANADA

LEGENDE

A l'exception du "Territoire" de la Convention de la Baie James et du Nord québécois et de la région visée par le règlement des Inuvialuit, les zones indiquées sur cette carte ne représentent que les limites approximatives dans lesquelles les diverses associations autochtones ont revendiqué un intérêt. La délimitation exacte de ces zones pour chaque groupe revendicateur sera déterminée au cours des négociations sur les règlements particuliers.

(1) Le Conseil des Indiens du Yukon (CIY)

(2a) Région visée par le règlement des Inuvialuit

(2b) Secteurs choisis* par les Inuvialuit selon la Convention Définitive des Inuvialuit

(3) La Nation Dénée

(4) L'Association des Métis des Territoires du Nord-Ouest (AMTNO)

(5) Fédération Tungavik de Nunavut (FTN)

(6) L'Association des Inuit du Labrador (AIL)

(7) L'Association Naskapi-Montagnais Innu (ANMI)

(8a) Le "Territoire" de la Baie James — La Convention de la Baie James et du Nord québécois et la Convention du Nord-Est québécois (le Grand Conseil des Cris du Québec & l'Association des Inuit du Nouveau Québec; les Naskapis de Schefferville)

(8b) Terres choisies* par les Cris, les Inuit du Québec et les Naskapis de Schefferville en conformité avec la Convention de la Baie James et du Nord québécois

(9) Le Conseil Attikamek-Montagnais (CAM)

(10) Iles limitrophes

*Configuration Approximative

Revisée en avril 1985

COMPREHENSIVE NATIVE CLAIMS IN CANADA

LEGEND

Apart from the James Bay "Territory" and the Inuvialuit Settlement Region, the areas indicated on this map represent only approximate boundaries of the areas in which the various native associations have claimed an interest. The precise delineation of these areas for each claimant group will be determined as negotiations proceed on the separate claims settlements.

(1) Council for Yukon Indians (CYI)

(2a) Inuvialuit Settlement Region

(2b) Land areas* selected by Inuvialuit pursuant to the Inuvialuit Final Agreement

(3) Dene Nation

(4) Metis Association of the Northwest Territories (MANWT)

(5) Tungavik Federation of Nunavut (TFN)

(6) Labrador Inuit Association (LIA)

(7) Naskapi-Montagnais Innu Association (NMIA)

(8a) James Bay "Territory" — James Bay and Northern Quebec Agreement and Northeastern Quebec Agreement (Grand Council of the Crees of Quebec & the Northern Quebec Inuit Association; Naskapis of Schefferville)

(8b) Land areas* selected by the Crees, Inuit of Quebec and Naskapis of Schefferville pursuant to the James Bay and Northern Québec Agreement

(9) Conseil Attikamek-Montagnais (CAM)

(10) Offshore Islands

*Approximate Representation

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